Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

KEVIN COOPER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) instituted a requirement that inmates who had already litigated to finality a federal habeas petition must first seek authorization from the court of appeals before filing a successive petition for writ of habeas corpus in the district court. 28 U.S.C. § 2244(b)(3)(A). Congress provided that this gatekeeper determination be made by a three-judge panel of the circuit court. 28 U.S.C. § 2244(b)(3)(B). The question presented is:

Does a federal circuit court have jurisdiction to sua sponte rehear en banc an application for authorization to file a successive habeas corpus petition after the application has been determined by a three-judge panel?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JEANNE WOODFORD, Warden, *Petitioner,*

v.

KEVIN COOPER, *Respondent.*

Jeanne Woodford, Warden of San Quentin State Prison, respectfully petitions for a writ of certiorari to review the judgment of the en banc United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the en banc panel authorizing the filing of a successive habeas corpus petition (App., *infra*, 1a-20a) is reported at 2004 WL 260581 (9th Cir., 04-70578, Feb. 9, 2004). The vacated order of the three-judge panel denying authorization to file a successive petition (App., *infra*, 22a-63a) was depublished. The intervening order memorializing the Ninth Circuit's vote in favor of en banc review of the three-judge panel's determination (App., *infra*, 21a) is reported at 357 F.3d 1054 (9th Cir. 2004).

JURISDICTION

The judgment of the en banc panel was entered on February 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

28 U.S.C. § 2244(b) provides:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie

showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. § 46 provides:

(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and,

notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

STATEMENT

Cooper was convicted and sentenced to death in 1985 for four murders committed in 1983 after he escaped from a state prison. The California Supreme Court affirmed the judgment in 1991, and subsequently denied Cooper habeas relief seven times. The United States District Court denied Cooper habeas relief in 1997, and the Ninth Circuit affirmed the denial in 2001. The Ninth Circuit subsequently denied two applications for

authorization to file a successive habeas petition in the District Court.

In 2001, the State permitted Cooper to conduct post-conviction DNA testing, the results of which further confirmed his guilt. Challenges to the findings and procedures were denied by the state courts. The State set an execution date of February 10, 2004. Cooper sought and was denied gubernatorial clemency.

Cooper next filed a variety of last-minute challenges to his death judgment and execution, including a third application in the Ninth Circuit for authorization to file a second or successive habeas corpus petition. On Sunday, February 8, the three-judge panel denied Cooper's gatekeeper application. On Monday, February 9, the Ninth Circuit voted *sua sponte* to grant rehearing en banc. That same day, at approximately 4:25 p.m., a majority of the en banc panel authorized Cooper to file a successive petition and stayed the execution. This Court denied the State's application to vacate the stay.

REASONS FOR GRANTING THE PETITION

The decision below presents a recurring question of federal law that is vitally important to the interests of the states in enforcing their criminal laws: Does a federal circuit court have jurisdiction to sua sponte rehear en banc an application for authorization to file a successive habeas corpus petition (gatekeeper application) after the application has been determined by a three-judge panel?

Congress expressly mandated that a gatekeeper application be presented to the court of appeals and *determined by a three-judge panel*. 28 U.S.C. § 2244(b)(3)(B). It also provided that the three-judge panel's determination would not be the subject of appeal, petition for rehearing, or petition for writ of certiorari. 28 U.S.C. § 2244(b)(3)(E). Federal circuit courts have been determining gatekeeper applications en banc, reasoning that the

statute only precludes en banc rehearing upon petition of a party, and does not foreclose *sua sponte* en banc review or rehearing. *See Cooper*, 2004 WL 260581 (App., *infra*, 1a); *In re Byrd*, 269 F.3d 585, 586 (6th Cir. 2001) (en banc); *Thompson v. Calderon*, 151 F.3d 918, 922 (9th Cir. 1998) (en banc). This practice exceeds the jurisdiction of the courts of appeals and abridges the rights of the states and victims of crime alike.

The plain language of the statute makes it clear that the determination of a gatekeeper application is to be made by a three-judge panel. 28 U.S.C. § 2244(b)(3)(B). There would have been no reason for this provision if Congress intended that a gatekeeper application be decided by either a three-judge panel or en banc court, because that is what the general law governing intermediate courts of appeals already provided. 28 U.S.C. § 46.

A sharp division has arisen among the judges of two circuits concerning this questionable exercise of *en banc* authority. *See In re Byrd*, 269 F.3d at 586; *Thompson*, 151 F.3d at 922. The Court should grant the Petition and ensure that federal circuit courts act within their jurisdiction in determining gatekeeper applications.

The State's right to enforce its criminal laws was improperly denied and the interests of comity and federalism disserved, when, less than eight hours before Cooper's impending execution, the en banc Ninth Circuit panel assumed for itself a gatekeeper role and substituted its judgment for that of the three-judge panel, thereby permitting Cooper to initiate yet another round of litigation in the District Court. The Ninth Circuit exceeded its jurisdiction by *sua sponte* determining Cooper's application for authorization to file a successive habeas petition en banc. The injury occasioned to the State and to victims when a federal circuit court exceeds its gatekeeper jurisdiction is substantial.

A. The Role of the Circuit Courts in Federal Habeas Corpus Is Limited to the Authority Granted by Congress

The authority of federal circuit courts to act on collateral challenges to state court convictions brought by state inmates is necessarily limited to that granted by Congress. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) became effective on April 24, 1996, and it removed the authority of the federal district courts to consider successive habeas corpus petitions in the first instance. Congress instead instituted a gatekeeper procedure that requires an inmate who has already litigated a federal habeas petition to finality to first seek authorization from the court of appeals in order to file a successive federal habeas petition in the district court. 28 U.S.C. § 2244(b)(3)(A).

Congress expressly mandated that the gatekeeper application be determined by a three-judge panel within 30 days of filing, and that the gatekeeper application not be the subject of appeal or petition for rehearing or certiorari.[1/] 28 U.S.C. § 2244(b)(3)(B)(D)(E). Accordingly, AEDPA expressly precludes the participation of an en banc panel or en banc court in determining a gatekeeper application.

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1. As noted, Congress has foreclosed either party from pursuing certiorari to review a circuit court's order granting or denying an application for gatekeeper authorization. 28 U.S.C. § 2244(b)(3)(E). But whether the Ninth Circuit acted within its jurisdiction in ordering *en banc* consideration of the gatekeeper application *sua sponte* is not a question foreclosed by that provision. *See Castro v. United States*, ___ U.S. ___, 124 S. Ct. 786, 790-791 (2003) (whether federal court properly recognized application as a second habeas effort is a question distinct from whether the order denying authorization to file a second or successive habeas application was correct).

B. The Plain Language of the Statute Makes It Clear That Sua Sponte En Banc Review or Rehearing Is Not Within the Limited Authority Granted to the Circuit Courts by Congress

"'The starting point in every case involving construction of a statute is the language itself.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976), quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). If "the terms of the statute are unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Garcia v. United States*, 469 U.S. 70, 75 (1984), quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187, n.33 (1978). The law clearly states that the gatekeeper determination "shall be made by a three-judge panel." 28 U.S.C. § 2244(b)(3)(B). The plain language of the statute is unambiguous:

> A motion in the court of appeals for an order authorizing the district court to consider a second or successive application *shall be determined by a three-judge panel of the court of appeals*.

28 U.S.C. § 2244(b)(3)(B) (emphasis added).

A number of federal circuit judges have concluded that en banc action on a gatekeeper application is "lawless." *In re Byrd*, 269 F.3d at 596 (Cole, J., dissenting). Other federal circuit judges have concluded that the legislative history supports *sua sponte* en banc review of a gatekeeper application because "when it said 'three,' all Congress meant was 'more than one.'" *Thompson*, 151 F.3d at 928. This argument relies on a comment by a single Senator, who was apparently "speaking to the risk of a single idiosyncratic appellate judge acting in error." *Id.* But the language of the statute itself will not bear that construction. As Judge Kleinfeld observed in his separate concurring opinion in *Thompson*:

> "Three" is among the plainest words Congress can use. If we could construe "three" to mean "eleven," imagine what we could do with "two." The Constitution says "two Senators from each State," Art. I, § 3. But because construing "two" to mean "two" would conflict with evolving standards of "one person one vote," perhaps we could construe "two" to mean "no fewer than two," allowing for perhaps "seven" Senators from a large state.

Thompson, 151 F.3d at 929.

Judge Cole of the Sixth Circuit concluded the power of an en banc panel to act *sua sponte* is "inherent" to its function as a reviewing court. *In re Byrd*, 269 F.3d at 593. This argument, however, ignores the fact that courts performing the gatekeeper function do not engage in "review"; rather, they pass upon the merits of a motion to permit further litigation to proceed.

"[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The "operative statute" for the "inherent power" to hear matters en banc is 28 U.S.C. § 46, which generally authorizes federal circuit courts to consider matters either by three-judge panel or en banc. Had Congress wanted this "general" rule to cover gatekeeper applications, it would have had no need to address the subject in § 2244(b) at all. This Court has been understandably reluctant to interpret statutes in a way that renders other provisions superfluous, *Hohn v. United States*, 524 U.S. 236, 249 (1998), and what Congress said in § 2244(b)(3)(E) cannot reasonably be construed to be reiterative of what it said in § 46. Quite to the contrary, subdivision (b)(3)(E) plainly alters what would otherwise be the "inherent" result under § 46.

The intermediate courts of appeals do not have an inherent power to act en banc. Accordingly, although the restriction in § 2244(b)(3)(E) speaks to "petitions for rehearing," Congress did not need to specify a bar on *sua sponte* en banc rehearing; it had already provided that the determination of gatekeeper applications must be made by a three-judge panel. The en banc prerogative is specifically controlled and regulated by Congress in 28 U.S.C. § 46. *Western Pac.R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 259 (1953). And the general statutory authority to proceed *en banc* is limited when a circuit panel acts in the context of AEDPA's unique gatekeeper function. Congress expressly provided that the function will be carried out by a three-judge panel whose rulings will be final. Compare *Calderon v. Thompson*, 523 U.S. 538, 549, 558 (1998) (inherent authority to recall mandate—a matter not expressly addressed in AEDPA—not limited by AEDPA). Under these circumstances, the en banc Ninth Circuit acted in excess of its jurisdiction in granting Cooper's gatekeeper application en banc.

It is scarcely surprising that Congress would make the judgment that the gatekeeper function should be determined by a three-judge panel. *En banc* review exists to secure or maintain uniformity of decisional law or to resolve a question of exceptional importance. Fed. R. App. P. 35; *see Western Pac. R. Corp.*, 345 U.S. at 260, n.20, citing *Textile Mills Sec. Corp. v. C.I.R.*, 314 U.S. 326, 334-336 (1941). By their nature, requests for authorization to file successive petitions present intensely fact-bound inquiries with little or no potential for creating any precedential conflict. Even in capital cases, *en banc* review is not properly available merely to second-guess a three-judge panel's application of routine legal standards. *Thompson v. Calderon*, 120 F.3d 1045, 1069-1070 (9th Cir. 1997) (Kozinski, J., concurring & dissenting), *reversed on other grounds*, *Calderon v. Thompson*, 523 U.S. 538.

The plain meaning of the statute makes it clear that a gatekeeper determination should not be the subject of *sua*

sponte review by an en banc circuit court, as it must be determined by a three-judge panel, in less than 30 days, and without any appeal, rehearing, or review on certiorari.

C. The Resolution of the Question Presented Is Vitally Important to the States and Crime Victims

Joshua Ryen was eight years old when Cooper murdered his entire immediate family (and friend who was spending the night) before leaving him for dead. After over 20 years of litigation, Joshua Ryen, now 29, his extended family, the family of Christopher Hughes, and their community, waited over two decades for justice to finally be served, only to witness the Ninth Circuit take up Cooper's case en banc for the first time less than 12 hours before his scheduled execution.

Resolution of the question presented in this Petition is important to maintaining the respect of citizens for the ability of the courts to punish the guilty, particularly those whose crimes are so offensive to society as to warrant the death penalty.

This Court has recognized the "significant costs" for the states from federal habeas corpus review. *McCleskey v. Zant*, 499 U.S. 467, 490-491 (1991). As this Court has further noted:

> If "[c]ollateral review of a conviction extends the ordeal of trial for both society and accused," [citation omitted] the ordeal worsens during subsequent collateral proceedings. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.

Id. at 492. The effectiveness of the criminal justice system itself is implicated: "[T]he criminal law is deprived of much of its deterrent effect" in the absence of finality. *Id.* at 491. While a State has independent power to pass laws, that power "means little if the State cannot enforce them." *Calderon v. Thompson*, 523 U.S. at 555-556. Finality is important to crime victims as well. As this Court has recognized:

> A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief. At that point, having in all likelihood borne for years "the significant costs of federal habeas review," [citation omitted], the State is entitled to the assurance of finality. When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. [Citation omitted]. To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty" [citation omitted], an interest shared by the State and the victims of crime alike.

Calderon v. Thompson, 523 U.S. at 556.

The ability of the criminal justice system to punish the guilty and otherwise command the public's respect depends on the finality and enforceability of its decrees.

> "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility."

McCleskey, 499 U.S. at 492, quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452-453 (1963) (footnotes deleted).

Congress clearly did not enact AEDPA, and the gatekeeper requirement in particular, to increase the opportunities for federal courts to engage in protracted inquiries that serve only to undermine the states' interest in finality and the public's confidence in its institutions.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: March 15, 2004.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN COOPER,
Petitioner,
v.
JEANNE WOODFORD, Warden,
San Quentin State Prison, San Quentin, California,
Respondent.

No. 04-70578
ORDER

Filed February 9, 2004

Before: Mary M. Schroeder, Chief Judge, Alex Kozinski, A. Wallace Tashima, Barry G. Silverman, Susan P. Graber, Kim McLane Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard C. Tallman, Johnnie B. Rawlinson and Jay S. Bybee, Circuit Judges.

Order;
Partial Concurrence and Partial Dissent by Judge Silverman;
Dissent by Judge Tallman

ORDER

A judge of this Court called for en banc review of the February 8, 2004, three-judge panel order in this case. A majority of the non-recused judges has voted in favor of en banc review of petitioner Kevin Cooper's application to file a second or successive petition for a writ of habeas corpus in the district court. *See* 28 U.S.C. § 2244(b)(3)(A). The statute does not allow a petition for rehearing of a denial of authorization to file a second or successive application, but we have *sua sponte*

power to rehear such a denial en banc. *Thompson v. Calderon*, 151 F.3d 918, 922 (9th Cir. 1998) (en banc), *cert. denied*, 524 U.S. 965 (1998); *In re Byrd*, 269 F.3d 585 (6th Cir. 2001), *cert. denied sub nom. Bagley v. Byrd*, 534 U.S. 1109 (2002); *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997). Cooper is scheduled to be executed at 12:01 a.m. tomorrow morning.

The district court denied Cooper's first federal petition in 1997, and we affirmed in *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001), *cert. denied*, 537 U.S. 861 (2002). Through newly obtained counsel, Cooper filed with this Court on February 6, 2004, an application to file a second or successive application in the district court. Cooper also filed a motion for a stay of execution. A majority of the three-judge panel voted to deny the application and the stay yesterday, February 8, 2004.

Cooper has made a claim of actual innocence, accompanied by a claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Because Cooper makes a claim of actual innocence accompanied by a claim of a constitutional violation, he is making a "gateway" claim under *Schlup v. Delo*, 513 U.S. 298 (1995). To make a successful claim under *Schlup*, "a petitioner must show that in light of all the evidence, including new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997) (en banc) (quoting *Schlup*, 513 U.S. at 327). The Supreme Court in *Schlup* "emphasized that in considering all the available evidence, the court is not bound by the rules of admissibility, but must consider 'all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.' " *Id.*

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), enacted in 1996, a petitioner seeking authorization to file a second or successive application for habeas corpus must satisfy two statutorily imposed conditions. He must show that

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §§ 2244(b)(2)(B)(i) and (ii).

The AEDPA requirements for a second or successive application are stricter than the *Schlup* standard in two ways. First, § 2244(b)(2)(B)(i) requires that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." There is no requirement under *Schlup* that the factual claim was not discoverable through the exercise of due diligence. Second, § 2244(b)(2)(B)(ii) requires that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing evidence* that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." (Emphasis added.) *Schlup* requires only that an applicant show that it is "more likely than not" that no reasonable factfinder would have found him guilty.

We should grant authorization to Cooper to file a second or successive application for habeas corpus if we find that he

has made a prima facie case of success on the merits of such an application. "By '*prima facie* showing' we understand simply a sufficient showing of *possible* merit to warrant a fuller exploration by the district court." *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)) (emphasis added).

We do not for purposes of this order decide whether the *Schlup* standard or the standard of 28 U.S.C. § 2244(b)(2)(B) applies. Under either standard, we hold that Cooper is entitled to file a second or successive application.

I. Background

On June 2, 1983, Cooper escaped from the minimum security area of the California Institute for Men (CIM) where he was incarcerated. He broke into and hid in an empty house in Chino Hills, about two miles away, in San Bernardino County, southeast of Los Angeles. Cooper made telephone calls from this house to his girlfriend asking for money, but she refused to help him. Cooper's last call from the house was at about 8:00 p.m. on June 4.

The Ryens lived next door, about 125 yards away from the house in which Cooper was hiding. During the night of June 4, 1983, the members of the Ryen household were viciously attacked. Doug and Peggy Ryen, the father and mother, were killed, as were their ten-year-old daughter, Jessica, and an eleven-year-old houseguest, Chris Hughes. Doug and Peggy's eight-year-old son, Josh, was left for dead but survived. The bodies of Doug, Peggy, Jessica, and Chris, as well as the stillliving Josh, were discovered the next day by Chris's father. All of the murder victims were killed by multiple chopping, cutting, and puncture wounds. Josh suffered the same type of wounds. Jessica was found clutching a substantial amount of fairly long blond or light brown hair in her hand.

Cooper was apprehended at the end of July 1983, and he was tried for capital murder in late 1984 and early 1985. Cooper took the stand and testified that he was innocent. He has consistently maintained his innocence since that time. Cooper testified at trial that he never went to the Ryen house. He testified that he left the house in which he had been staying after that last phone call at 8:00 pm on June 4 and hitchhiked to Mexico. Uncontradicted evidence at trial indicated that Cooper checked into a hotel in Tijuana at about 4:30 p.m. the next day, June 5. After seven days of deliberation, the jury found Cooper guilty of death-eligible first degree murder. After four additional days of deliberation, the jury sentenced Cooper to death.

II. *Brady* Violation

Cooper attaches two new sworn declarations to his application, both signed in January 2004. These declarations, if believed, appear to indicate that a *Brady* violation has taken place and that crucial evidence introduced at trial was not reliable. Only two pieces of evidence at trial connected Cooper to the Ryen house. One was a bloody tennis shoe print found on a sheet in Doug and Peggy's bedroom. The other was a single spot of blood found on a wall in the hallway.

There was testimony at trial about the print of a "Pro-Ked Dude" tennis shoe found on a sheet in the Ryens' bedroom, as to which the testimony of two witnesses, William Baird and James Taylor, was particularly important. The California Supreme Court specifically discussed and relied on the testimony of these two men in sustaining Cooper's conviction on direct appeal. *People v. Cooper*, 53 Cal. 3d 771, 797-98 (1991).

A company representative testified at trial that "Pro-Ked Dude" tennis shoes are manufactured by Stride Rite solely for distribution in prisons and other institutions. They are not

distributed to the general public. The sheet from the Ryens' bedroom was initially not thought to have any footprints. However, a bloody footprint was discovered on the sheet after it was taken to the lab and refolded in the manner it had been folded when the footprint was made. William Baird, the Crime Laboratory Manager, testified that the shoe print on the sheet matched two prints found in the other house, and that all of the prints had been made by a close-to-new "Pro-Ked Dude" shoe. Baird further testified that he had a close-to-new "Pro-Ked Dude" shoe of approximately the same size in his lab, previously obtained from another prison. He testified that this shoe allowed him to analyze the print on the sheet and determine that it had come from a prison-issued "Pro-Ked Dude" shoe.

James Taylor, an inmate at CIM during the time Cooper was incarcerated, was a recreation attendant. Taylor testified at trial that he initially gave Cooper a pair of "P.F. Flyer" tennis shoes. He testified that Cooper, then imprisoned under the false name of David Trautman, exchanged his "P.F. Flyers" for a pair of black "Pro-Ked Dudes" a few days before he was transferred to the minimum security area. Cooper escaped from the prison soon after he was transferred to the minimum security area.

Cooper attaches to his application a sworn declaration of Midge Carroll, who was Warden of CIM at Chino while Cooper was incarcerated there. Warden Carroll's declaration, dated January 30, 2004, states:

> 1. I was the Superintendent, or Warden, of the California Institution for Men at Chino, California, from 1982 through 1985. As Warden of this state penal facility, I had extensive contact with members of the San Bernardino Sheriff's Department who were responsible for the investigation of Kevin

Cooper as a suspect in what became known as the Chino Hills Murders.

2. I was employed by the California Department of Corrections from 1966 until I permanently retired in 1999 . . . .

3. As the Warden of the California Institute for Men at Chino, my contact with San Bernardino County deputy sheriffs about aspects of the investigation in the Kevin Cooper case included conversations with one of the lead detectives about shoeprint evidence found at the crime scene. I communicated to one of the lead investigators that the notion that the shoeprints in question likely came only from a prison-issue tennis shoe was inaccurate. I came to this conclusion after conducting a personal inquiry of the appropriate staff, including the deputy warden, the business manager responsible for procurement, and the personnel responsible for warehousing. I learned that the shoes we carried were not prison-manufactured or specially designed prison-issue shoes. I learned that the shoes were common tennis shoes available to the general public through Sears and Roebuck and other such retail stores. I passed this information along to the detective. Had I been contacted, I would have testified to this on behalf of either the prosecution or defense, and I would have provided supporting documentation.

Cooper also attaches a sworn declaration of his present counsel stating that Cooper's investigators became aware of the information contained in Warden Carroll's declaration on January 30, 2004, the date the declaration was signed.

The declaration of Warden Carroll makes out a prima facie case of a *Brady* violation. The date of the Carroll declaration, and counsel's declaration that Cooper first became aware of the information in the Carroll declaration on that same date, together make out a prima facie case that the information could not have been previously discovered through the exercise of due diligence.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has a constitutional obligation to turn material exculpatory evidence over to the defendant. This obligation is independent of any specific request by the defendant for such information. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995).

The significance of Warden Carroll's communication would have been clear to San Bernardino Sheriff's Department investigators. Because of the testimony of Baird and Taylor, the State was able to tell a damaging story about the presence of a bloody "Pro-Ked Dude" footprint in the bedroom of the murder victims, a footprint only Cooper, an escaped prisoner, could have left. But if Warden Carroll had been put on the stand and had been believed by the jury, the jury would have known that Cooper was almost certainly not wearing "Pro-Ked Dude" shoes. Cooper also attaches to his declaration a hand-written sworn declaration of James Taylor, dated January 8, 2004, which states:

> 1. I was an inmate at the Reception Center West (RC-W) at the California Institute for Men in Chino California in May and June of 1983.

> 2. During that period of time, I met David Trautman, whose real name I understand to be Kevin Cooper. I met Kevin when he tried out for the basketball team. My job at the prison was recreation attendant. I was responsible for issuing basketball shoes to men in our unit who played on the team.
>
> 3. I issued only one pair of shoes to Kevin Cooper. I issued him a pair of P.F. Flyers. This brand was the best brand of shoe for basketball that the prison stocked. Kevin did not trade these shoes in to me for a pair of Keds, nor did he trade these shoes in to me for any other pair.

The new Taylor declaration is, of course, consistent with the Carroll declaration. If the information in Warden Carroll's declaration is true, it is necessarily true that Taylor could not have handed out "Pro-Ked Dude" shoes to Cooper. Taylor's new declaration states that he did not, in fact, hand out such shoes.

III. Other Evidence

Once a *Brady* violation has been established, a federal habeas court is required to evaluate all information in the case, not just information relevant to the *Brady* violation. Other evidence in the case suggests that about three Caucasian or Mexican men, rather than Cooper, might have committed the murders. Such evidence includes initial statements of Josh Ryen in the hospital, who stated that three or four men committed the murders, and that the men did not have black or brown skin. While still in the hospital, Josh Ryen saw a picture of Cooper on television and stated that he was not one of the men. Josh Ryen identified Cooper at trial as the murderer, but his earlier statements are inconsistent with this identification.

Jessica Ryen was found with numerous strands of blond or light brown hair clutched in her hand. Cooper, an African-American, could not be the source of the hair. That hair has not been tested, despite a request by Cooper.

Diana Roper has earlier supplied a sworn declaration that her then-boyfriend, Lee Furrow, came home late on the night of the murders without a t-shirt he had been wearing earlier in the day. He wore, instead, blood-spattered coveralls, which he took off and left at the house with Roper. Five days later, Roper turned the coveralls over to police, but the police threw the coveralls away without testing them and without alerting Cooper's counsel to their existence. Further, Kenneth Koon confessed to a fellow inmate, with whom he was smoking marijuana in prison, that he and two other men had committed the Ryen/Hughes murders. According to the inmate who reported the conversation, Koon said they had gone to the Ryen house to "collect a debt" but had "hit the wrong house." Koon said that two of the men went afterwards to his "old lady's house" to leave bloody coveralls. Koon had previously been romantically involved with Roper.

A bloody t-shirt and a blood-stained hatchet were found beside the road, in separate locations, after the murders. Roper states in her declaration that Furrow's hatchet was missing, and that the murder weapon had the same distinctive handle as Furrow's hatchet. Roper further states that she is sure the recovered bloody Fruit-of-the-Loom t-shirt is the same shirt Furrow was wearing earlier on the day of the murders.

Finally, two declarations have been filed during the last day and a half from two women who were in a bar near the Ryens' house on the night of the murders. One of the declarations states that three men came into the bar, but that one of the three stayed in the background. The declaration states that the other two men "were very loud and obnoxious and behaved bizarrely." It says that one of the two had longer-than

average "medium brown or dirty blond hair." The other man wore coveralls. The other declaration describes two blond men. Both declarations state that the front of the two men's clothing and faces were splattered with blood. The men spoke in a kind of gibberish and appeared to be under the influence of drugs.

There was, of course, evidence pointing to Cooper's guilt at trial. Salient among that evidence was a spot of blood taken from a hallway in the Ryen house, the bloody t-shirt, and a hand-rolled cigarette found in the Ryens' abandoned car in Long Beach. Pursuant to an agreement between Cooper and the State, all three of these pieces of evidence have been subjected to DNA testing. All three tests resulted in a positive match with Cooper's DNA. Despite this DNA evidence, Cooper continues to maintain his innocence.

Cooper requests that a further test be done on the bloody t-shirt to determine whether EDTA, a preservative agent, is in that blood. If EDTA is present, Cooper maintains, that will show that his blood was placed on the t-shirt after the fact by someone who had access to his drawn blood. The State has refused to perform a test for EDTA.

IV. Authorization to File Application

We are not in a position fully to evaluate the strength of the Cooper's *Brady* claim. Nor are we in a position to undertake the difficult task of evaluating the information derived from the *Brady* claim in light of the other evidence in the case, treating much of that evidence with the deference required for prior factfinding by the state courts. We hold only that Cooper has made out a prima facie case that entitles him to file a second or successive application. A prima facie showing on one claim in a second or successive application permits an applicant to "proceed upon his entire application in the district court." *Woratzeck*, 118 F.3d at 650.

* * *

This case centers on Cooper's claim that he is innocent. No person should be executed if there is doubt about his or her guilt and an easily available test will determine guilt or innocence. Cooper has asked specifically that two tests be done.

First, Cooper asks that the blood on the t-shirt be tested for the presence of the preservative EDTA. The presence of such a preservative would show that his blood was not on the t-shirt at the time of the killings, but was rather placed there at some later time.

Second, Cooper asks that the blond or light brown hair in Jessica Ryen's hand be subjected to mitochondrial DNA testing. Such testing, if favorable to Cooper, would exclude other members of the Ryen family and Chris Hughes as sources of the hair. It could also positively identify Lee Furrow, and perhaps others, as the killer or killers, if those men can now be located.

In his brief to us, Cooper states, "Through readily available mitochondrial testing of blond hairs found in one of the victim's hands, and testing for the presence of the preservative agent EDTA on a T-shirt[ ] the State belatedly claimed contained Mr. Cooper's blood, the question of Mr. Cooper's innocence can be answered once and for all."

The district court may be in a position to resolve this case very quickly. As soon as Cooper's application is filed, it should promptly order that these two tests be performed in order to evaluate Cooper's claim of innocence.

In accordance with the foregoing, we authorize Cooper to file his second or successive application for habeas corpus in

the district court. We order Cooper's execution stayed pending the resolution of that application.

IT IS SO ORDERED.

SILVERMAN, Circuit Judge, with whom RAWLINSON, Circuit Judge, joins, concurring in part and dissenting in part:

Cooper is either guilty as sin or he was framed by the police. There is no middle ground.

Cooper asserts a freestanding claim of actual innocence. In *Herrera v. Collins*, 506 U.S. 390, 393 (1993), the Supreme Court held that a freestanding claim of actual innocence based on newly discovered evidence was not a ground for habeas corpus relief. *See also Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002). However, the Supreme Court assumed, without deciding, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417. The Court noted that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.; see also Schlup v. Delo*, 513 U.S. 298, 315-16 (1995). We have held that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997) (rejecting a *Jackson v. Virginia* modified sufficiency of the evidence test for such claims); *see also Turner*, 281 F.3d at 872; *Jackson v. Calderon*, 211 F.3d 1148, 1164 (9th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001).

Everything comes down to the bloody t-shirt. At trial, the prosecution presented no evidence that the t-shirt contained Cooper's blood. Cooper subsequently sought DNA testing to

show that he did not commit the murders. DNA testing established that the shirt contained Cooper's blood and the blood of one or more of the victims. This is very damning evidence, but Cooper contends that his blood was planted on the shirt by law enforcement officers. If the blood was planted, he says, it will reflect a high level of EDTA, a preservative agent contained in the vial in which the blood was stored. A high level of EDTA will show that the blood came from the vial rather than directly from him, proving that the police tampered with evidence in an effort to frame him. Conversely, if the blood is *not* contaminated by EDTA, the shirt conclusively proves his guilt. As Cooper himself puts it, "the question of Mr. Cooper's innocence can be answered once and for all."[1]

Since Cooper's guilt can be quickly and definitively determined by means of a simple test, there is no reason not to have it performed prior to his execution. I would hold in abeyance Cooper's application to file a second or successive petition, and I would order the parties to promptly arrange for the testing of the shirt. I would stay his execution in the meantime. The public cannot afford a mistake. Neither can Cooper.

TALLMAN, Circuit Judge, with whom Circuit Judge BYBEE joins, dissenting from En Banc Stay Order:

Because the court acts to stay the execution of Kevin Cooper in derogation of the standard set by Congress for evaluating successive habeas corpus petitions, I respectfully dissent. We do not apply the familiar standards as if this case were on direct or collateral review. The court ducks the question whether the standard announced in *Schlup v. Delo*,

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[1]Cooper represents to the court that his next-of-kin intends to obtain the t-shirt and test it for EDTA even if the execution goes forward.

513 U.S. 298 (1994), has been superceded by AEDPA. The majority finds that, under either standard, Cooper has made his case for a successive habeas petition. With the greatest respect for the concerns expressed by my colleagues in the majority, I disagree.

For successive appeals like this, 28 U.S.C. § 2244(b)(2) controls:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Applying this standard, the panel majority (Circuit Judges Rymer and Gould) carefully evaluated the merits of Cooper's eleventh hour attempt to delay the imposition of his sentence in this 21-year-old case. *See* Order entered 2/08/04.

Under § 2244(b)(2)(B)(i), Cooper must establish that the factual predicate for any constitutional claim "could not have been discovered previously through the exercise of due diligence." He has not met this burden. With regard to Cooper's *Brady* claim concerning the prosecution's alleged failure to inform the defense of the Chino warden's information

concerning the general availability of the Pro-Ked shoes, the proper test under § 2244(b)(2)(B)(i) is whether this information was available upon the exercise of due diligence. The warden's declaration explicitly states that she was ready and willing to share this information with the defense. The fact that the warden only recently came forward with this information is not dispositive under § 2244(b); the defense's utter failure to independently investigate the issue evinces a lack of diligence.

Even if Cooper could meet the (B)(i) due diligence standard, he has not made a prima facie showing of a constitutional violation. *See* 28 U.S.C. §§ 2244(b)(2)(B)(ii), (b)(3)(C). The majority cites the standard set forth in *Schlup v. Delo*, finding that had the warden's information been provided to the defense and presented at trial, it is "more likely than not" that a reasonable factfinder would not have found Cooper guilty. Although we have not specifically addressed and resolved the question of *Schlup's* applicability post-AEDPA, I believe that *Schlup's* "more likely than not" standard is irreconcilable with the "clear and convincing" standard of AEDPA. Cooper has failed to show that the facts offered, "if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). Therefore, he does not satisfy the stringent statutory requirements for filing a successive habeas petition. *See David v. Hall*, 318 F.3d 343, 347 n.5 (1st Cir. 2003); *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002); *In re Minarik*, 166 F.3d 591, 600 (3d Cir. 1999).

Even assuming for purposes of this argument that *Brady* information was withheld, Cooper cannot satisfy the § 2244(b)(2)(B)(ii) standard because *Brady* is not violated unless the information withheld is material. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). First, the best evidence is

not the warden's hearsay, but the testimony introduced by the state at trial. Contrary to the majority's reading of the warden's affidavit, she did not state that tennis shoes issued at Chino were different from tennis shoes issued at other prisons. Rather, she stated that "the notion that the shoeprints in question likely came only from a prison-issue tennis shoe was inaccurate." At Cooper's trial, the key footwear-related evidence was the testimony of the Stride Rite shoe company representative, who testified that Pro-Ked Dude shoes were sold exclusively to state institutions and that the tread on the soles of these shoes were unique to his brand. Additionally, James Taylor, an inmate at Chino, testified that he issued a pair of black Pro-Ked Dude shoes to Cooper shortly before Cooper escaped. Although the warden's information contradicts the representative's and Taylor's testimony, there is no reason to believe that the warden was in a better position than the Stride Rite representative to opine on the distribution of Pro-Ked Dude shoes in prisons, or that she could contradict Taylor's testimony that he, in fact, issued Cooper a pair of these shoes. Because the warden's research consisted merely of asking prison personnel about the availability of this brand of shoes, her recent declaration does not undercut the evidence offered at trial.

Even if the warden's claim was completely credited—that the Pro-Ked shoes issued to prisoners at Chino could be purchased generally—it does not undermine the key evidence the jury heard. The critical fact is that the same shoe pattern prints were found inside the Ryen house (where the murders occurred), just outside the Ryen house, and in the Lease house (where Cooper indisputably stayed). Whether these shoes were available to the general public or only to prison inmates, the same prints were found in both homes. Viewed against the evidence as a whole, the information that Cooper now urges is not sufficient to establish by clear and convincing evidence that, but for the alleged constitutional errors, no reasonable jury could have concluded that he was

guilty even if the warden's information had been available to the defense at trial. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). Indeed, we could not conclude even under *Schlup* that Cooper's evidence is sufficient to justify yet another round of habeas review. As Justice O'Connor observed in *Schlup*,

> "[A] petitioner does not pass through the gateway erected by *Murray v. Carrier*, 477 U.S. 478 (1986), if the district court believes it more likely than not that there is any juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt."

513 U.S. at 333 (O'Connor, J., concurring).

The majority further finds that Cooper has met the extraordinarily high burden under AEDPA for bringing an evidence tampering claim in a successive petition. Cooper's claim that the bloody T-shirt was tampered with is, at its core, the same claim he raised at trial and at every proceeding since trial. He has repeatedly contended that the San Bernardino County Sheriff's Office and crime lab employees tampered with and manipulated evidence. The portion of the t-shirt that matched Cooper's DNA was in the continuous possession of the state superior court since the trial. Accordingly, the contamination would have to have occurred before trial and before the advent of forensic DNA testing. Therefore, as far as we know, the state never received the benefit of any such conspiracy to tamper with evidence. At trial, the state only contended that the stain belonged to victim Doug Ryen.

As the panel noted, the state trial court determined at the evidentiary hearing that "Cooper's claims lacked merit." The panel also accurately stated, "We resolved in connection with Cooper's motion for a second habeas corpus petition that nothing claimed about the DNA testing satisfies the requirements for a second or successive application." More

than one court has reviewed this evidence tampering claim and found it unpersuasive. In his application, Cooper fails to present any newly discovered facts sufficient to justify allowing him to bring the successive petition.

Regarding the Slonaker and Mellon-Wolfe declarations, the defense fully explored at trial the issue of who was present at the Canyon Corral Bar and what occurred there on the night of the murders. Edward Lelko, the bartender at the Canyon Corral Bar that night who had come forward the next day on his own volition to tell the police what he had seen, was called by the defense at trial. He, at no point, testified or reported to police that the suspicious patrons were spattered with blood. Furthermore, the prosecution called Shirley Killian, the manager of the Canyon Corral Bar, who testified that the men had close-cut military-type haircuts and wore light-colored tshirts. She noticed no blood or stains on their shirts or clothing. It is inconceivable that two witnesses who saw these men—one called by the defense, and the other by the prosecution—would not have noticed it. Accordingly, none of this information would be sufficient, even if proven, to establish by clear and convincing evidence that no reasonable juror could have found Cooper guilty. At best, he has discovered additional evidence for impeachment, but not to establish actual innocence.

Furthermore, the majority fails to appreciate the powerful circumstantial evidence tying Cooper to these crimes. Lost in defense counsel's voluminous pleadings with which we have been inundated over the past two days are a number of crucial facts. As noted above, the same shoe impression was found inside the Ryen house, just outside it, *and* in the Lease house. The evidence is undisputed that Cooper was the only suspect inside the Lease house. There are no other shoe prints.

Also conspicuous by its absence is any mention by the defense that a red-stained button, identical to those worn on

prison-issue field jackets, was found in the bedroom of the Lease home where Cooper admits he was hiding out and where he apparently showered after the murders. Luminol tests showed the presence of blood on the shower wall and Cooper's foot print was found on the sill of the shower. Long before any DNA testing was conducted, blood evaluation by the crime laboratory of the bloody spot on the wall of the Ryen murder scene showed characteristics attributable to African-Americans. No other suspect that Cooper now offers in variations of his defense theory that someone else murdered the Ryen family and their young guest is African- American.

After careful, thoughtful, and thorough consideration of this procedurally and factually byzantine case, the panel correctly determined that Cooper fails to satisfy AEDPA's stringent standard for bringing a successive habeas petition. This is not the "extraordinary case" justifying a stay of execution based upon a claim of actual innocence. *Schlup*, 513 U.S. at 321. Because the panel was correct, I respectfully dissent.

[Caption Omitted in Printing]

Filed February 9, 2004
Before: Mary M. Schroeder, Chief Judge.

ORDER

A judge of this Court called for en banc review of the February 8, 2004 order in this case. A majority of the non-recused active judges have voted in favor of en banc review of the denial of Cooper's application to file a successor petition for writ of habeas corpus in the district court. The published order filed February 8, 2004 shall not be cited as precedent by or to this court or any district of the Ninth Circuit, except to the extent adopted by the en banc court.

The motion for stay of execution is granted pending further order of the en banc court.

[Caption Omitted in Printing]

Filed February 8, 2004
Before: James R. Browning, Pamela Ann Rymer, and Ronald M. Gould, Circuit Judges.

Order; Dissent by Judge Browning

ORDER

Kevin Cooper, a California death row inmate whose execution is scheduled for Tuesday, February 10, 2004 at 12:01 a.m., has filed an application to file a successor petition for writ of habeas corpus under 28 U.S.C. § 2244(b)(3), and a request for stay of execution. His request for an order authorizing the district court to consider this petition — his third application in the federal system following denial of his original habeas petition — is premised on the existence of evidence with respect to a blood spot, cigarette butts, and shoe print impressions that he asserts was manufactured by the state and which, if known to the jury, would have weakened the links in the state's chain of circumstantial evidence. He asks for another chance affirmatively to demonstrate his innocence through available mitochondrial DNA testing of hairs found in one of the victim's hands, and testing for the presence of a preservative agent EDTA on a T-shirt. However, with immaterial exceptions, this application turns on facts that have long since been known and that have already been presented and resolved adversely to Cooper in state court evidentiary hearings, proceedings before the California Supreme Court on direct and collateral review, in his original habeas petition in federal court, and in connection with his applications in this court to file second or successive petitions. To the extent that the claims are formulated differently in the petition he now asks to file, they are nevertheless based on facts that were available and could previously have been discovered with the exercise of due diligence. For this reason, Cooper fails to make the

showing that the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) requires for approval of his application. 28 U.S.C. § 2244(b)(3)(C).

In addition, Cooper's petition does not set forth facts that are sufficient to show by clear and convincing evidence that, in light of the evidence as a whole, no reasonable factfinder would have found him guilty of the offenses charged. The few items of evidence upon which Cooper now relies that were not before the jury have little or no probative value and fall short of showing that it is more likely than not that no reasonable juror would have convicted him.

Cooper has made no showing of actual innocence, nor has he shown that it would be manifestly unjust for the courts to decline to revisit the same issues again. Accordingly, we deny the application to file this successive petition. Given this decision, there is no basis for granting a stay.

I

On June 2, 1983, Cooper escaped from the California Institute for Men (CIM), a state prison.[1] He admitted that he stayed in a vacant house (the Lease house) next door to the Ryens' residence on Thursday night, all day Friday, and Friday night; he hid in the bathroom when one of the owners of the Lease house stopped by on Saturday morning. The murders happened Saturday night. Using a hatchet or axe and a knife, he hacked to death Douglas and Peggy Ryen (37 separate wounds for Douglas, 32 for Peggy), their ten-year-olddaughter Jessica (46 wounds), and eleven-year-old Christopher Hughes (26 wounds), who was spending the night at the Ryens' home. Cooper also inflicted chopping wounds to the head, and

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[1]These facts are taken from *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001).

stabbing wounds to the throat, of eight-year-old Joshua Ryen, who survived.

At the Lease house, a blood-stained khaki green button identical to the buttons on field jackets issued at the state prison from which Cooper escaped was found on the rug. Tests revealed the presence of blood in the shower and bathroom sink of the Lease home, and hair found in the bathroom sink was consistent with that of Jessica and Doug Ryen. A bloodstained rope in the Lease house bedroom was similar to a bloodstained rope found on the Ryens' driveway. A hatchet covered with dried blood and human hair that was found near the Ryens' home was missing from the Lease house, and the sheath for the hatchet was found in the bedroom where Cooper stayed. Buck knives and at least one ice pick were also missing from the Lease home, though a strap from one buck knife was found on the floor.

Blood found in the Ryens' home was the victims', except for one drop on a wall near where the murders occurred. It belonged to an African-American male, which Cooper is. Two partial shoe prints and one nearly complete shoe print found in the Ryens' house were consistent both with Cooper's size and the Pro Keds shoes issued at CIM.

The Ryens' vehicle, which had been parked outside their house, was missing when the bodies were discovered but was later found in Long Beach. A hand-rolled cigarette butt and "Role-Rite" tobacco that is provided to inmates at CIM (but not sold at retail) was in the car. Similar loose leaf tobacco was found in the bedroom of the Lease house where Cooper had stayed. A witness testified that Cooper smoked handrolled cigarettes using Role-Rite tobacco. A hair fragment discovered in the car was consistent with Cooper's pubic hair and a spot of blood found in the car could have come from one of the victims but not from Cooper.

Cooper was charged with four counts of first degree murder and one count of attempted murder in the first degree, and with escape from state prison. He pled guilty to escaping from state prison. On February 19, 1985, a jury convicted Cooper of the first degree murders of Franklyn Douglas Ryen, Jessica Ryen, Peggy Ann Ryen and Christopher Hughes, and of attempted murder in the first degree of Joshua Ryen. The jury found true the special circumstance of multiple murders, which made Cooper death-eligible under California's sentencing scheme. The jury also found true the special circumstance that Cooper intentionally inflicted great bodily injury on Joshua Ryen. The jury then determined the penalty as death on the four murder counts. On May 6, 1991, the California Supreme Court affirmed the convictions and sentence. *See People v. Cooper*, 53 Cal. 3d 771, 281 Cal. Rptr. 90 (1991). The United States Supreme Court denied a petition for writ of certiorari on December 16, 1991. *Cooper v. California*, 502 U.S. 1016 (1991).

On March 24, 1992 Cooper requested appointment of counsel and a stay of execution from the United States District Court for the Southern District of California. He then filed a petition for writ of habeas corpus in the district court on August 11, 1994, and an amended petition on April 12, 1996. Meanwhile, he returned to state court to exhaust a number of claims. On February 19, 1996, the California Supreme Court denied Cooper's state habeas petition. Cooper then filed a supplemental petition in district court on June 20, 1997. Following an evidentiary hearing, the petition was denied on August 25, 1997. We affirmed in *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001), and Cooper's petition for a writ of certiorari was denied by the United States Supreme Court. 537 U.S. 861 (2002). Cooper filed numerous additional papers in state court, and another federal petition for writ of habeas corpus on April 20, 1998. We treated his appeal from the district court's denial of that petition as an application for authorization to file a second or successive petition for writ of

habeas corpus based on trial counsel's ineffective assistance with respect to the Koon confession, which we denied. *Cooper v. Calderon*, 274 F.3d 1270 (9th Cir. 2001). Cooper then filed a request to file another successor petition that involved DNA testing and tampering, which we also denied; *Cooper v. Calderon*, No. 99-71430 (9th Cir. Feb. 14, 2003, Apr. 7, 2003) (orders).

Cooper has filed six writs of habeas corpus in the California Supreme Court, the most recent of which was filed on February 2, 2004 and denied February 5, 2004. The petition before the California Supreme Court raised similar claims to those asserted in this application (actual innocence, tampering with evidence, failure to disclose exculpatory evidence, offering unreliable eye witness testimony of Joshua Ryen, denying Cooper the effective assistance of counsel during postconviction DNA proceedings, and refusal of the state superior court to accept his petition for filing). The supreme court denied all claims on the merits and also denied those having to do with evidence tampering, failure to disclose exculpatory evidence/submission of false testimony to the jury, and offering Ryen's unreliable testimony as untimely, *In re Robbins*, 18 Cal. 4th 770, 780 (1998).

II

Cooper's application is governed by AEDPA. Under AEDPA, in order for us to grant Cooper's application to file a successive petition, he must present a claim that was not previously presented in a federal habeas petition, and that relies on either a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, or a factual predicate which could not have been discovered through due diligence and that would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the offense. 28 U.S.C. §§ 2244(b)(1), 2244(b)(2). We must decide

whether his application makes a prima facie showing that satisfies these requirements. 28 U.S.C. § 2244(b)(3)(C).

Cooper argues that he has satisfied these prerequisites because evidence that he says is newly discovered through DNA proceedings, including evidence of false statements by the criminalist and continuing attempts to prevent Cooper from proving his innocence, provide factual predicates for compelling constitutional claims. As we will explain, findings by the state trial court after an evidentiary hearing are directly to the contrary. Cooper further contends that the evidence as a whole, including a confession by Kevin Koon, establishes by clear and convincing evidence that, but for the state's treachery, no reasonable factfinder would have been led to find Cooper guilty. As we will also explain, the district court found that the Koon confession would have had no effect on the outcome of the trial, and this court denied Cooper's request to file a second or successive petition on the same issue.

Further, Cooper submits that a claim is not subject to the requirements of § 2244(b) when the events that give rise to the claim occurred after resolution of the prior habeas petition. For this he relies on *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998), and *Hill v. State of Alaska*, 297 F.3d 895, 898-99 (9th Cir. 2002). These cases are not helpful, however, because both involved issues such as competence to be executed that could not have been included in an earlier petition.

Finally, Cooper maintains that the requirements of § 2244(b)(2) need not be satisfied for a second or successive habeas corpus application to be considered by the district court because actual innocence is a constitutional safety valve. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Herrera v. Collins*, 506 U.S. 390 (1993); *McCleskey v. Zant*, 499 U.S. 467 (1991). We do not decide in this case whether or not this is so, because as we shall explain, Cooper has neither affirmatively proven

actual innocence nor shown that it is more likely than not that, in light of all the evidence, including reliable new evidence of actual innocence, no reasonable juror would have found him guilty beyond a reasonable doubt. *See Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997) (adopting this standard).

III

The petition that Cooper asks for leave to file asserts nine claims. We consider them in turn.

Actual innocence (claim one). Cooper's application repeats his theory of defense — that he did not commit the murders and the prosecution provided no motive. He relies on evidence, or the lack of it, that he also relied upon at trial or presented in his first federal habeas petition and applications for second or successive petitions: that Joshua Ryen referred to several assailants and said he had never seen Cooper before; that three suspicious men were observed in the vicinity of the murders on the night they occurred; that the number of weapons used indicates multiple assailants were involved; that law enforcement ignored information about other possible suspects, in particular Diana Roper's that Lee Furrow (her boyfriend) may have participated in the murders and left "bloody" coveralls in her closet; that the police destroyed the coveralls; that the state ignored a purported confession by Kevin Koon; and that cigarette butts were tampered with. All of this, except perhaps for the cigarette butts (which we consider in connection with the second claim), has been known since the time of trial, but regardless, does not show that Cooper is probably innocent.

Evidence that Joshua Ryen said that three strangers had been at the house earlier looking for work and at one point said that he believed they may have been involved was before the jury. It lacks probative force given that he also testified that he only saw one person in the house when the murders occurred. Other people could have been at the house, too, yet Cooper's

innocence would not be shown because his blood was on the wall and strong circumstantial evidence connected him with the house and the Ryens' car. Cooper's reliance on the Roper evidence is misplaced, because that evidence would show that Roper had a "vision" that the coveralls might have some importance to the Ryen murders, and that the law enforcement official to whom the coveralls were given believed they looked stained but not blood-stained. That officer testified at an evidentiary hearing in state court that the coveralls had hair, sweat, dirt, and manure on them. He testified similarly at trial. Thus, the evidence was considered by the jury. In addition, both the state trial court after an evidentiary hearing, and the district court on Cooper's first habeas petition, determined that the coveralls had no exculpatory value at the time they were destroyed and that there was no factual basis for finding any bad faith on the part of the prosecutor or sheriff. The first federal petition likewise resolved that the Koon "confession" was not material. Another inmate (Anthony Wisely) told officers that Koon confessed, but Koon himself said that he had not. It is not more likely than not that no reasonable juror would have found Cooper guilty based on this.

Cooper points to one piece of evidence that is newly discovered, that an inmate at the Chino Institute for Men where Cooper was incarcerated before his escape recanted (on January 8, 2004) his trial testimony that he gave Cooper a pair of Pro Keds tennis shoes shortly before Cooper escaped. Even if the inmate's recantation could not have been discovered previously through the exercise of due diligence, this evidence alone lacks clear and convincing force and is not sufficient to show that no reasonable factfinder would have found Cooper guilty if this fact had been known. The same applies to Cooper's claim that evidence exists that Pro Keds shoes were also available to the military and were not special-issue to CIM. The reason is that no matter what the source of the shoes, the same print impression was found outside the Ryen master bedroom, on a sheet on the Ryen bedroom waterbed, and in the game room of

the Lease house. This connected Cooper, who stayed in the Lease house, to the scene of the crime. Considered in light of all the evidence, the newly discovered recantation would not be sufficient to establish that no reasonable juror would have found Cooper guilty.

Cooper's successive petition also alleges that his innocence would be manifest by mitochondrial DNA testing on blond hair clutched by one of the victims and EDTA testing on a bloody T-shirt, and would have been manifest but for mishandling of Exhibit A-41 (the blood spot found in the hallway of the Ryens' home), cigarette butts from the Ryen car and the Lease house, and a shoe impression. Information about how the exhibits were treated and tested is not newly discovered. Dr. Gregonis, the criminalist who analyzed the blood spot (Exhibit A-41), was extensively cross-examined at trial about his analysis and about the fact that he had changed his original analysis. The trial court found after an evidentiary hearing that all tests had been conducted in good faith. The postconviction DNA testing claims were also before us, and resolved, in connection with Cooper's application for a second and successive petition. That application (in Case No. 99-71430) and Cooper's request for us to reconsider our denial of it, which we treated as if it were a new application, were based on DNA testing, asserted deficiencies in the testing process, and tampering. We concluded that there was no basis for a petition based on any of these claims. *Cooper v. Calderon*, Case No. 99-71430 (9th Cir. Feb. 14, 2003) (noting that DNA tests to which the state and Cooper agreed are not exculpatory and denying motion to file a second habeas corpus petition as Cooper failed to present newly discovered facts establishing his innocence); *Cooper v. Calderon*, Case No. 99-71430 (9th Cir. Apr. 7, 2003) (order denying Cooper's petition for rehearing that was based on asserted deficiencies in the testing and tampering). These issues may not be revisited. 28 U.S.C. § 2244(b)(1).

In addition, there was a three-day evidentiary hearing in June 2003 with respect to whether further mitochondrial testing was warranted on the hairs in the victims' hands, and whether law enforcement personnel tampered with or contaminated the evidence that was analyzed using nuclear DNA testing. The trial court found that Cooper had not shown that mtDNA testing of the hairs recovered from the victims' hands was material to the identity of the perpetrator, and that even if the results were favorable to him, it would not create a reasonable probability that a different verdict would have been returned by the jury. The trial court also found that Gregonis (and other San Bernardino officials) credibly testified as to the chain of custody of the evidence in question, that Gregonis did not contaminate or tamper with any piece of evidence, and that Cooper made no showing that law enforcement personnel tampered with or contaminated any evidence in his case. *Order Denying Motion For Mitochondrial DNA Testing, Claim of Evidence Tampering, and Request for Post-Conviction Discovery*, Case No. CR 72787 (Superior Court of the State of California in and for the County of San Diego, July 2, 2003). These findings are presumptively correct, 28 U.S.C. § 2254(e)(1), and no clear and convincing evidence alleged by Cooper rebuts them.[2]

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[2]On Saturday night, February 7, at 11:18 p.m. Cooper's counsel transmitted to the court a February 7, 2004 declaration of Christine M. Slonaker. It relates her experience at the Canyon Corral Bar on the night of June 4-5, 1983. Others who were at the Bar at the same time testified at trial about the behavior of three strangers who came to the bar that evening. To the extent that Slonaker's account twenty-one years later differs from that of other percipient witnesses, it just "serves to undercut the evidence presented at trial, not affirmatively to prove [Cooper's] innocence." *Carriger*, 132 F.3d at 477. If, on the other hand, the new evidence places Cooper's claim in "a significantly different and stronger evidentiary posture," then

(continued...)

Evidence tampering, destruction, and withholding (claim two). Cooper argues that the heart of his claim is that the state at trial, and through today, continues a pattern of deception and manipulation of evidence, inept and corrupt practices, and concealing official misconduct. In particular, he faults the work of criminalist Daniel Gregonis about most of which, as his application notes, the courts are well aware. The application points to newer evidence that Gregonis and Department of Justice criminalist Myers mishandled and contaminated evidence in 1999 and thereafter in connection with DNA testing, that Gregonis tampered with Exhibit A-41, that the state failed to deal with other blood samples in the vicinity of Exhibit A-41, that cigarette butts were mishandled, that evidence (such as the footprint, and sheath) were planted, and that leads were not pursued. The application also asserts that some of the officials involved in the investigation of the Cooper case were themselves at some time the subject of criminal investigations, the most significant of which in his view was San Bernandino Sheriff's Department Crime Lab manager William Baird. The district court already considered Cooper's allegation that the prosecution should have informed him about Baird's termination from the Sheriff's Department in 1988 (three years after the trial and five years after the investigation occurred), and determined that there was no *Brady* or *Agurs* violation[3] and no reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. That

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[2](...continued)
the state courts have to be given an opportunity to consider it "in the first instance." *Aiken v. Spalding*, 841 F.2d 881, 883-84 & n.3 (9th Cir. 1988). In that case, the federal courts could not consider it because Cooper has failed to exhaust his state remedies.

[3]*Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976).

other officials have been investigated for matters unrelated to the Cooper case is largely irrelevant. Cooper suggests that the *Brady* duty extends through post-conviction proceedings, but even if so the duty would be to disclose information that was material to trial. Finally, so far as tampering with the DNA testing (which occurred during post-conviction proceedings) is concerned, the state trial court determined in its evidentiary hearing that Cooper's claims lacked merit, and we resolved in connection with Cooper's motion for a second habeas corpus petition that nothing claimed about the DNA testing satisfies the requirements for a second or successive application.

Failure to disclose exculpatory evidence (claim three). Cooper's application asserts that the prosecution knew about, and suppressed, Baird's alleged heroin use, failed to disclose information that three Hispanic males who were in jail on other charges in the summer of 1984 discussed their participation in the Ryen murders, and that the warden did not think that the tennis shoes that left the prints were particularly unique. However, none of this information is newly discovered.

Unreliable or altered testimony of Joshua Ryen (claim four). Cooper claims that Joshua Ryen's perceptions and recollections changed and were unduly influenced by law enforcement. Cooper also claims that the state's interference deprived him of relevant testimony. However, this is not newly discovered.

Denial of access to the courts (claim five). Cooper claims that he was denied access to the courts because the state trial court refused on January 23, 2004 to accept his most recent petition for writ of habeas corpus and two discovery motions, and the California Supreme Court denied his petition without requesting informal briefing. We discern no constitutional violation cognizable on federal habeas review. There is nothing untoward about the superior court deferring to the supreme court, particularly given the time exigencies involved, and

Cooper's claims were adjudicated by the supreme court on the merits. The superior court had already denied Cooper's request for additional, mitochondrial DNA testing and found that it would shed no light on the outcome of the trial.

Evidence about bloody coveralls (claim six). As Cooper acknowledges, the claim regarding the destruction of the bloody coveralls has been raised in every available forum, and has been denied in every forum.

Ineffective assistance of counsel (claims seven, eight and nine). Cooper raises three claims that he was denied effective assistance of counsel with respect to the Koon confession, the bloody coveralls together with Lee Furrow's possible participation in the murders, and evidence of brown and blond hairs in the victims' hands that could not have come from Cooper. Nothing averred about the Koon confession is newly discovered. We previously determined that an ineffective assistance claim based on it would be a second or successive petition and denied leave to proceed with respect to it. *Cooper v. Calderon*, 274 F.3d at 1275. In any event, as the district court determined, the Koon confession was not material so even if counsel were deficient, there would be no prejudice. Nor is there anything new about connecting the coveralls to Lee Furrow or the fact that the victims were clutching hairs or fibers differently colored from Cooper's.

Either because the claims were previously raised and are now barred, 28 U.S.C. § 2244(b)(1), or were previously known or discoverable, 28 U.S.C. § 2244(b)(2)(B)(i), and because the facts underlying the claims in light of the evidence as a whole do not show clearly and convincingly that no reasonable factfinder would have found Cooper guilty, 28 U.S.C. § 2244(b)(2)(B)(ii), Cooper's application fails to satisfy the requirements of AEDPA and must be dismissed.

IV

Cooper argues that apart from AEDPA, he has shown actual innocence sufficient to preclude imposition of the death penalty, *Herrera*, 506 U.S. 390, or that he has at least made a strong enough showing of innocence to permit consideration of procedurally barred claims under *Schlup*, 513 U.S. 298. *Carriger*, 132 F.3d 463. We do not believe that the standard for either is met.

There are two types of actual innocence claims. A freestanding claim of actual innocence does not require due diligence, and protects the entirely innocent. The threshold for establishing actual innocence regardless of constitutional error at trial is "extraordinarily high." *Carriger*, 132 F.3d at 476 (quoting *Herrera*, 506 U.S. at 417 (O'Connor, J., concurring)). We have held that it is higher than the standard to invalidate a conviction because of insufficient evidence, which is that no rational finder of fact could convict beyond a reasonable doubt in light of all the presently available evidence. *Id.* Rather, a freestanding claim of innocence requires affirmative proof of innocence. *Id.* Put differently, a petitioner making a freestanding claim of actual innocence "must present evidence of innocence so strong that his execution would be 'constitutionally intolerable even if his conviction was the product of a fair trial.'" *Id.* at 478 (quoting *Schlup*, 513 U.S. at 316).

Cooper has not affirmatively proved his actual innocence by "'reliable evidence not presented at trial.'" *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324). At most he alleges the stuff of which cross-examination is made, not evidence that he did not do it. *See Carriger*, 132 F.3d at 477 ("Although the postconviction evidence he presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, not affirmatively to prove Carriger's innocence.").

However, "[w]hile a petitioner making a *Herrera* claim must present evidence of innocence so strong that his execution would be 'constitutionally intolerable *even if* his conviction was the product of a fair trial,' a petitioner making a miscarriage of justice claim need only present evidence of innocence strong enough 'that a court cannot have confidence in the outcome of the trial *unless* the court is also satisfied that the trial was free of nonharmless constitutional error.' " *Carriger*, 132 F.3d at 478 (quoting *Herrera*, 506 U.S. at 442-44 (Blackmun, J., dissenting)) (italics in original) (internal quotation marks omitted). To permit consideration of a procedurally barred claim, a petitioner must show that "in light of all the evidence, including new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.' " *Id.* (quoting *Schlup*, 513 U.S. at 327).

Other circuits have stated that the *Schlup* "gateway" has been codified in AEDPA and requires a petitioner to show a factual predicate which could not have been discovered through due diligence, and that would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the offense. *See, e.g., David v. Hall*, 318 F.3d 343, 347 n.5 (1st Cir. 2003) ("In AEDPA Congress adopted a form of actual innocence test as one component of its threshold requirements for allowing a second or successive habeas petition; but it also provided that this second petition is allowed only where the factual predicate for the claim of constitutional error could not have been discovered previously through the exercise of due diligence.") (citing 28 U.S.C. § 2244(b)(2)(B)); *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002) (stating that the *Schlup* "gateway" to consider otherwise procedurally barred claims is "partially codified" in AEDPA at § 2244(b)(2)(B)(ii)); *see also In re Minarik*, 166 F.3d 591, 600 (3rd Cir. 1999) (stating that AEDPA "significantly altered" the showing a petitioner is "required to make in order to proceed on new claims in a second petition," by requiring a petitioner to show

actual innocence and that the factual predicate for the claim could not have been previously discovered through due diligence); *cf. United States v. Barrett*, 178 F.3d 34, 48 (1st Cir. 1999) (referring to the "actual innocence" exception to the bar on second or successive petitions as part of the pre-AEDPA test).

Were we to adopt this reasoning of other circuits, Cooper's lack of due diligence would foreclose his actual-innocence-as-a-gateway argument. But we do not need to resolve this question because Cooper cannot show actual innocence under either the "clear and convincing" AEDPA § 2244(b)(2)(B)(ii) requirement, or the "more likely than not" *Schlup* requirement. To the extent that AEDPA does not codify *Schlup*, we believe for the same reasons that no sufficient showing for a second or successive application is made, that none is made for purposes of *Schlup*.

In addition to what we have already explained, even if Cooper were entirely correct that the post-conviction DNA testing to which he agreed was deficient, and even if Dan Gregonis, the San Bernardino County criminalist who Cooper claims contaminated evidence to incriminate him did contaminate evidence to which he had access, the *other* items of evidence to which the criminalist did *not* have access also inculpate Cooper. That would include a hand-rolled cigarette butt recovered from the Ryen station wagon, a hatchet (one of the murder weapons) with blood and hair evidence, that part of the blood-stained T-shirt which matched Cooper's DNA, and a blood-stained button found in the Lease house. Of course, the jury convicted Cooper without the benefit of DNA evidence, and a reasonable jury could find him guilty even without the incriminating results and even if cross-examination of the criminalist would show that he was negligent or corrupt or both in connection with it. In any event, the state trial court explicitly found that no such conduct occurred. Finally, there is no reasonable likelihood that mitochondrial DNA testing

would be probative of innocence, for any number of people could have come and gone through the Ryen house leaving hairs.

In sum, neither singly nor in combination do these items establish Cooper's innocence, or show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. To the contrary, there was clear and compelling evidence that linked Cooper to the crime. After escaping from prison, he stayed at the Lease house that was next door to the Ryens' home; his blood was found on the hallway wall opposite the master bedroom door of the Ryen house; shoe print impressions in the Lease house matched the pattern of prison-issued shoes and one of them was bloody; cigarette butts and tobacco in the Lease house and Ryens' station wagon were prison-issued; a blood-stained khaki green button identical to buttons on field jackets worn by inmates at Chino Institute for Men was found on the rug in the bedroom that Cooper used in the Lease house after the murders; a hatchet was missing from the Lease house and its sheath was found in the bedroom that Cooper used; and that bedroom and its bathroom, which had been cleaned earlier that day, showed signs of blood after the murders. *See People v. Cooper*, 53 Cal.3d at 795-800 (detailing the evidence of guilt).

As we deny Cooper's application for authorization to file this successor petition, and no other ground appears for issuing a stay, we also deny his request for a stay of execution.

APPLICATION DENIED.

BROWNING, Senior Circuit Judge, dissenting:

Kevin Cooper is scheduled to be executed at one minute after midnight on Tuesday, February 10, 2004. He seeks two things.

First, Cooper wants to test two pieces of blood evidence for the presence of a preservative. Recent DNA tests of a blood spot and a bloody t-shirt have produced a positive DNA match for Cooper. Cooper contends there has been tampering and that his blood was placed on the evidence after it was collected. A simple and inexpensive test for a preservative in the blood will determine whether he is correct. The test would show whether the blood on the spot and on the t-shirt had a chemical used by crime laboratories to preserve blood samples in their possession.

Second, Cooper wants to test strands of long blond or light brown hair found clutched in the hand of Jessica Ryen, one of the murder victims. We already know the hair did not come from Cooper, an African-American. Cooper contends Jessica pulled the hair from one of her killers. Photographs in the record clearly show that the amount of hair is substantial, and it is clutched in Jessica's hand. The test could rule out the hair having come from one of the victims. There is evidence in the record to indicate that the crime was committed by three Caucasian men. Thus the test could also corroborate that evidence.

The State has been asked to permit these two tests, but refuses. As justification for its refusal, it states that Cooper had a fair trial, that the evidence of Cooper's guilt is overwhelming, and that it needs to proceed with Cooper's execution.

Contrary to the State's assurances, Cooper did not have a fair trial. Cooper has presented a sworn declaration of a state prison warden that, if believed, suggests that the State fabricated crucial evidence linking Cooper to the murders for which he has been convicted. Nor is the evidence of Cooper's guilt overwhelming. Indeed, as the evidence mounts that the State used unreliable and fabricated evidence to convict Cooper, the evidence of his guilt correspondingly diminishes.

There should be no hurry to execute Cooper. If he is truly guilty, these simple tests will resolve the matter. If he is truly innocent, those same tests will tell us that. When the stakes are so high, when the evidence against Cooper is so weak, and when the newly discovered evidence of the State's malfeasance and misfeasance is so compelling, there is no reason to hurry and every reason to find out the truth.

I. Nature of the Current Proceedings

Cooper has applied for authorization to file a second or successive petition for habeas corpus under 28 U.S.C. § 2244(b)(3)(A). We must grant authorization if we find that Cooper has made a *prima facie* case for relief under a second or successive petition. "By '*prima facie* showing' we understand simply a sufficient showing of *possible* merit to warrant a fuller exploration by the district court." *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)) (emphasis added).

There are two possible standards that Cooper must satisfy.

First, if Cooper's claims are entirely governed by 28 U.S.C. § 2244 because he is seeking to file a second or successive petition, he must show that

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have

> found the applicant guilty of the underlying offense.

28 U.S.C. §§ 2244(b)(2)(B)(i) and (ii).

Cooper has presented newly discovered evidence, including evidence of a constitutional violation in the form of a significant violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Based on the record before us, there is a *prima facie* case that Cooper could not previously have discovered this evidence through the exercise of due diligence. In addition, Cooper has presented previously known evidence that is newly relevant because of intervening events since he last sought authorization to file a second or successive petition. Cooper's new evidence constitutes a "factual predicate" for the claims he seeks to present in his petition for habeas corpus. If Cooper's new evidence is believed and "viewed in light of the evidence as a whole," he has made out a *prima facie* case that such evidence would be "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii).

Second, if Cooper's claims are governed by the more lenient standard of *Schlup v. Delo*, 513 U.S. 298 (1995), he need not satisfy the "clear and convincing evidence" requirement of § 2244(b)(2)(B)(ii). As long as he has satisfied the requirement of § 2244(b)(2)(B)(i) that the factual predicate of his claim "could not have been discovered previously through the exercise of due diligence," *Schlup* would require only that he "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." 513 U.S. at 327. If Cooper's new evidence is believed, and considered in light of the record as a whole, Cooper has made out a *prima facie* case that would entitle him to relief under the "more likely than not" standard of *Schlup*.

We do not need to decide whether the "clear and convincing evidence" standard of § 2244(b)(2)(B)(ii) or the "more likely than not standard" of *Schlup* applies. Cooper has made out a *prima facie* case under either standard.

II. Background

On June 2, 1983, Cooper escaped from the minimum security area of the California Institute for Men ("CIM") where he was incarcerated. He broke into and hid in an empty house in Chino Hills, about two miles away, in San Bernardino County, southeast of Los Angeles. The house was owned by a man named "Lease." Cooper made telephone calls from the Lease house to his girlfriend asking for money, but she refused to help him. Cooper's last call from the house was at about 8:00 pm on June 4.

The Ryens lived next door, about 125 yards away from the Lease house. During the night of June 4, 1983, the members of the Ryen household were viciously attacked. Doug and Peggy Ryen, the father and mother, were killed, as were their ten-year-old daughter, Jessica, and an eleven-year-old houseguest, Chris Hughes. Doug and Peggy's eight-year-old son, Josh, was left for dead but survived. The bodies of Doug, Peggy, Jessica, and Chris, as well as the still-living Josh, were discovered the next day by Chris's father. All of the murder victims were killed by multiple chopping, cutting, and puncture wounds. Josh suffered the same type of wounds. Jessica was found clutching a substantial amount of long blond or light brown hair in her hand, some of which had roots attached.

Cooper was apprehended at the end of July 1983, and he was tried for capital murder in late 1984 and early 1985. Cooper took the stand and testified that he was innocent. He has consistently maintained his innocence. Cooper testified at trial that he never went to the Ryen house. He testified that he left the Lease house after that last phone call at 8:00 pm on June

4 and hitchhiked to Mexico. Uncontradicted evidence at trial indicated that Cooper checked into a hotel in Tijuana at about 4:30 pm the next day, June 5. After seven days of deliberation, the jury found Cooper guilty of death-eligible first degree murder. After four additional days of deliberation, the jury sentenced Cooper to death.

III. Newly Discovered Evidence

Cooper seeks authorization to file a second or successive habeas application based on newly discovered evidence. Cooper attaches two new sworn declarations, both signed in January 2004, which, if believed, would indicate that crucial evidence may have been fabricated. Evidence presented at trial showed that Cooper left a bloody shoe print on a sheet in the Ryens' bedroom. A newly presented declaration by the then-Warden of CIM at Chino, if believed, demonstrates both that the State committed a clear violation of *Brady v. Maryland*, and that the State likely fabricated the evidence of the shoe print.

Cooper also presents new evidence, as well as pre-existing but newly relevant evidence, pertaining to recent DNA testing by the State. In 2001, the State tested three items of evidence for the presence of Cooper's DNA: a blood spot in the hallway of the Ryen house; blood on a t-shirt found beside the road three days after the murders; and saliva on two handrolled cigarettes the State claims to have found in the Ryens' abandoned station wagon. Cooper seeks additional testing of the blood to determine if a preservative is present. The presence of a preservative would show that Cooper's blood was planted. If believed, Cooper's evidence — both new and newly relevant — would suggest evidence tampering.

Finally, Cooper presents a declaration of Christine Slonaker, who states that she was in a Chino Hills bar on the night of the murders. She says she encountered two blond

Caucasian men — one in a light colored t-shirt and jeans, the other in overalls, and both wearing tennis shoes — who were inebriated and spotted with blood. The declaration is new evidence, dated February 7, 2004, and if believed, would further corroborate pre-existing but newly relevant evidence that Cooper was not the man who committed the Ryen/Hughes murders.

A. The Bloody Shoe Print

Only two pieces of evidence at trial directly connected Cooper to the Ryen house. One was a bloody tennis shoe print found on a sheet in Doug and Peggy's bedroom. The other was a single spot of blood found on a wall in the hallway.

Several people testified at trial about the shoe print found on the Ryens' bedsheet. Several testified that Cooper had a new or close-to-new pair of "Pro-Ked Dude" tennis shoes. One key witness testified that prints from a "Pro-Ked Dude" shoe were found on the sheet in the Ryen house, on the shower sill in the Lease house, and in the game room in the Lease house. "Pro-Ked Dude" tennis shoes are manufactured by Stride Rite solely for distribution in prisons and other institutions. They are not distributed to the general public.

The testimony of two witnesses, William Baird and James Taylor, was particularly important on this point. The California Supreme Court specifically discussed and relied on their testimony in sustaining Cooper's conviction on direct appeal. *People v. Cooper*, 53 Cal. 3d 771, 797-98 (1991).

William Baird was the Crime Laboratory Manager, in charge of collecting and analyzing evidence connected to the Ryen/Hughes murders. The sheet from the Ryens' bedroom was not initially thought to have any footprints. A bloody footprint was discovered on the sheet after it was taken to the lab. Baird's assistant, David Stockwell, testified that the

footprint could be seen when the sheet was folded the same way it had been folded when in the Ryens' bedroom (thereby bringing together two parts of the footprint that were separated when the sheet was flat). (Exhibit 191.)[1] Baird testified that the shoe print on the sheet matched two prints found in the Lease house, and that the prints had been made by a close-to- new "Pro-Ked Dude" shoe, made for and distributed only to prisons. (Exhs. 99, 210). Baird further testified that he had a close-to-new "Pro Ked Dude" shoe of approximately the same size in his lab, previously obtained from another prison. He testified that this shoe allowed him to analyze the print on the sheet and determine that it came from a prison-issued "Pro-Ked Dude" shoe. (Exh. 210.)

James Taylor was an inmate at the CIM during the time Cooper was incarcerated there. Taylor was a recreation attendant at the prison. As part of that job, he issued tennis shoes to inmates. Taylor testified at trial that he initially gave Cooper a pair of "P.F. Flyer" tennis shoes. He testified that Cooper, then imprisoned under the false name of David Trautman, exchanged his "P.F. Flyers" for a pair of black "Pro-Ked Dudes" a few days before he was transferred to the minimum security area. (Exh. 103.) Cooper escaped from the prison soon after he was transferred to the minimum security area.

Cooper attaches two recent declarations as exhibits to the habeas petition he seeks to file. The first is a hand-written sworn declaration of James Taylor, dated January 8, 2004, which states:

> 1. I was an inmate at the Reception Center West (RC-W) at the California Institute

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[1]I refer to the exhibits as they are numbered in the habeas petition that Cooper now seeks permission to file.

for Men in Chino California in May and June of 1983.

2. During that period of time, I met David Trautman, whose real name I understand to be Kevin Cooper. I met Kevin when he tried out for the basketball team. My job at the prison was recreation attendant. I was responsible for issuing basketball shoes to men in our unit who played on the team.

3. I issued only one pair of shoes to Kevin Cooper. I issued him a pair of P.F. Flyers. This brand was the best brand of shoe for basketball that the prison stocked. Kevin did not trade these shoes in to me for a pair of Keds, nor did he trade these shoes in to me for any other pair. (Exh. 100.)

Second, and more important, Cooper attaches a sworn declaration of Midge Carroll, who was Warden of CIM at Chino while Cooper was incarcerated there. Warden Carroll's declaration, dated January 30, 2004, states:

1. I was the Superintendent, or Warden, of the California Institution for Men at Chino, California, from 1982 through 1985. As Warden of this state penal facility, I had extensive contact with members of the San Bernardino Sheriff's Department who were responsible for the investigation of Kevin Cooper as a suspect in what became known as the Chino Hills Murders.

2. I was employed by the California Department of Corrections from 1966 until I permanently retired in 1999. . . .

> 3. As the Warden of the California Institute for Men at Chino, my contact with San Bernardino County deputy sheriffs about aspects of the investigation in the Kevin Cooper case included conversations with one of the lead detectives about shoeprint evidence found at the crime scene. I communicated to one of the lead investigators that the notion that the shoeprints in question likely came only from a prison-issue tennis shoe was inaccurate. I came to this conclusion after conducting a personal inquiry of the appropriate staff, including the deputy warden, the business manager responsible for procurement, and the personnel responsible for warehousing. I learned that the shoes we carried were not prison-manufactured or specially designed prison-issue shoes. I learned that the shoes were common tennis shoes available to the general public through Sears and Roebuck and other such retail stores. I passed this information along to the detective. Had I been contacted, I would have testified to this on behalf of either the prosecution or defense, and I would have provided supporting documentation.

(Exh. 101.)

Both the Taylor and the Carroll declarations are newly discovered evidence. The Taylor declaration, by itself, is not particularly helpful to Cooper. It is, of course, a recantation of extremely important evidence introduced at trial, but a mere recantation by a non-governmental agent, absent an accompanying constitutional violation, is not a sufficient ground for habeas relief.

The Carroll declaration, on the other hand, discloses a clear *Brady* violation. Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has a constitutional obligation to turn material exculpatory evidence over to the defendant. This obligation is independent of any specific request by the defendant for such information. *United States v. Agurs*, 427 U.S. 97, 107 (1976). The duty extends to impeachment as well as exculpatory evidence. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995).

The significance of Warden Carroll's communication must have been clear to the San Bernardino Sheriff's Department investigators. They knew they had little or no direct evidence connecting Cooper to the Ryen house. The "Pro-Ked Dude" tennis shoe print provided that evidence. Because of the testimony of Baird and Taylor, the State was able to tell a damaging story about the presence of a bloody "Pro-Ked Dude" footprint in the bedroom of the murder victims, a footprint only Cooper, an escaped prisoner, could have left. But if Warden Carroll had been put on the stand and had been believed by the jury, the State's story would have been shown to be untrue.

The failure of the State to provide Cooper with the information that Warden Carroll gave to the San Bernardino Sheriff's Department, and that she now provides in her declaration, was unquestionably a *Brady* violation. Such a *Brady* violation meets the threshold requirement in 28 U.S.C. § 2244(b)(2)(B)(i) that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."

It is the State's withholding of the Warden's evidence, rather than any lack of diligence, that explains why Cooper's attorneys have not presented this evidence before. *See Jaramillo v. Stewart*, 340 F.3d 877, 882 (9th Cir. 2003) (explaining in the context of cause for procedural default that failure to discovery a *Brady* claim lies with the state if the petitioner had no reason to know of state's withholding); *cf. Strickler*, 527 U.S. at 287-88 ("[A] defendant cannot conduct the 'reasonable and diligent investigation' . . . to preclude a finding of procedural default when the evidence is in the hands of the state."); *Julius v. Jones*, 875 F.2d 1520, 1525 (11th Cir.), *cert. denied*, 493 U.S. 900 (1989) (*Brady* claim not procedurally barred because defendant may "rely on a belief that prosecutors will comply with the Constitution and will produce *Brady* material on request"). If the Warden's declaration is believed, the State misled Cooper's attorneys by asserting that the prison issued "Pro-Ked Dude" shoes. We should not penalize Cooper by transforming the State's constitutional violation into Cooper's lack of diligence.

B. DNA Testing

As soon as DNA testing became technologically possible, Cooper asked that it be done on the evidence in his case. The State finally consented to DNA testing on three items: a spot of blood found in the hall of the Ryen house; a t-shirt found beside the road three days after the murders; and two handrolled cigarette butts the State purportedly found in the Ryens' abandoned station wagon in Long Beach, California.

The DNA testing was performed by a laboratory of the California Department of Justice in Berkeley, California in 2001. The result was a positive match for Cooper for all three items. Cooper seeks to present newly discovered evidence surrounding the DNA testing. Cooper also seeks to present previously known but newly relevant evidence — evidence that takes on a new meaning in light of the DNA testing.

1. The Blood Spot from the Hall

A blood spot, marked in evidence as A-41, was taken from the hall in the Ryen house. Daniel Gregonis, the criminologist for the San Bernardino Sheriff's Department, testified at trial that this blood was consistent with Cooper's. Gregonis was impeached at trial based on deficiencies in his testing of the physical evidence, particularly including the A-41 spot.

Cooper presents newly discovered evidence of tampering with A-41 prior to DNA testing. When it came time for the DNA testing, Cooper's defense team noticed that Gregonis had simultaneously checked out A-41, as well as samples of Cooper's blood and saliva, for a 24-hour period on August 13 and 14, 1999. (Exh. 146.) According to Gregonis, this was done at the direction of the District Attorney in order to determine whether A-41 still existed. (Exh. 105.) Although Gregonis claims that he did not open the glass bindle that contained the pillbox that contained the A-41 sample when it arrived for testing at the DNA lab in 2001, Gregonis's initials were present on the tape that seals the package. (Exhs. 36, 38, 94.) In common laboratory practice, a seal with an individual's initials on it indicates that the individual opened a bag, and constitutes the only record of the evidence bag being opened. (Exh. 106.) The presence of Gregonis's initials suggests that, contrary to his sworn testimony, Gregonis opened the bag containing A-41. Further, the seal protecting A-41 from contamination was different when counsel viewed it in 2001, compared to when it was viewed in 1998. (Exhs. 36, 38.)

Cooper also presents evidence, not available at trial, that the sample has changed physical form since the trial. In 1995, A-41 consisted of plaster chips in a metal pillbox. In 1998, however, it consisted of a capped vial that contained white chips and the metal pillbox, inside of which was a smaller vial

containing more white chips. In 2001, A-41 consisted of a vial with white chips and a metal pillbox with an empty vial inside.

The evidence of tampering with A-41 was not available to the defense at the time of trial. Moreover, Cooper presented this evidence to the California courts as soon as they learned of it, when DNA testing occurred in 2001. Cooper's counsel could not have reasonably been expected spontaneously and repeatedly to check all of the evidence logs when there was no reason for the State to have checked out the evidence. Rather, they discovered that Gregonis had accessed the evidence when the sample was taken to be tested in 2001. They raised the issue before the state courts soon thereafter.

This newly discovered evidence suggests the possibility that A-41 was contaminated with Cooper's blood or saliva, both of which he had also checked out at the same time. Such contamination would, of course, invalidate the results of the DNA testing. The newly discovered evidence of tampering is particularly important when considered in light of other mishandling of evidence adduced at trial. Gregonis testified that he had conducted a blind study of A-41, in which he tested the sample without knowing that Cooper was a suspect. (Ex. 147.) However, his own notes belie that fact. He knew Cooper was a suspect and had a sample of his semen by which he would have known which enzymes in the blood in A-41 would tie Cooper to the sample.

This was not the only time Gregonis may have used an improper scientific technique or contradicted himself at trial. When Gregonis conducted further testing, he did so by placing A-41 and Cooper's blood side-by-side for comparison. Although he initially denied doing so, he changed testimony when given his own laboratory notes that indicated otherwise. (Exh. 151.) Reflecting the problems of not having performed a blind study, Gregonis apparently changed his initial results of tests on A-41 so that Mr. Cooper's enzyme profile would match

that of the donor of the A-41 sample, admitting that he had changed his notes after the fact only when confronted by counsel at trial. (Exhs. 152, 12.)

2. The Bloody T-Shirt

Cooper presents no newly discovered evidence directly relevant to the bloody t-shirt. As already recounted, however, Cooper has presented newly discovered evidence suggesting that the "Pro-Ked Dude" shoe print on the sheet from the Ryens' bedroom may have been fabricated. Cooper has also presented evidence from which one may draw a conclusion of possible tampering with the A-41 sample. The inference of tampering with that sample is, of course, made stronger if it is shown that the same was done with other evidence.

As detailed below, there is also already-known evidence linking the t-shirt to a potential suspect, Eugene Leland ("Lee") Furrow. Furrow's girlfriend, Diana Roper, and Roper's sister, Karee Kellison, have provided declarations stating that Furrow came home early in the morning on the night of the murders, driven in a brown station wagon containing several people. Previously that evening, Furrow had been wearing a Fruit-of-the-Loom t-shirt that Roper described as identical to the bloody t-shirt found beside the road and introduced into evidence. Furrow was no longer wearing the t-shirt. Instead, he was wearing coveralls that were spattered with blood. Furrow took off the coveralls, put them in the closet, and departed quickly. Roper strongly suspected that Furrow was involved in the Ryen/Hughes murders and turned the coveralls in to the police. As will be recounted below, these coveralls were never turned over to the defense, but were, instead, thrown away by the police into a dumpster.

Cooper has not been able to determine the precise mechanism by which his blood might have been placed after the fact on the t-shirt. However, he has provided enough evidence,

both newly discovered and already known, to raise a reasonable suspicion that there has been tampering with the t-shirt.

3. The Hand-Rolled Cigarettes

Cooper presents newly discovered evidence that the handrolled cigarette butts tested for the presence of his DNA were not those introduced as evidence at trial in 1984. One of the butts, designated V-12, had measured 4 mm long when it was introduced at trial. (Exh. 95.) However, when it was tested in 2001 for the presence of Cooper's DNA, that same butt measured 7 mm in length. (Exh. 98.) This suggests either mishandling or tampering, and calls into question the DNA test linking Cooper to the Ryens' station wagon in which the butts were supposedly found. As with the A-41 sample, Cooper had no reason to check the length of the cigarette butt until the DNA testing occurred.

The import of this new evidence becomes clear in light of evidence available at trial that the origin of the cigarette butts was questionable, and that the butts, like other evidence, changed in form between trial and DNA testing. The circumstances of how the cigarette butts were found is somewhat suspicious. Although police found in the Lease house several cigarette butts of the type ultimately found in the Ryen car in Long Beach, only one of those cigarette butts was logged into evidence. (Exhs. 33, 18.) During an initial investigation of the station wagon, Detective Hall made no mention of any handrolled cigarette butts of the type smoked by Cooper. He did, however, find and inventory other small pieces of evidence in the area in which the cigarette butts were ultimately found. (Exh. 17.) Further, Detective Hall found other cigarettes in the car, although these cigarettes were subsequently lost. Only during a second search of the car, conducted by other criminologists, was one cigarette butt of a type issued in prisons found. (Exh. 22.) This is the butt (V-12) on which the DNA testing was done.

V-12 appears to have been mishandled before and during trial. During a pre-trial hearing on July 12, 1984, Gregonis testified that V-12 appeared to have been Cooper's. However, he said that independent verification of this fact would be impossible due to the fact that he "exhausted the sample." (Exh. 169.) However, V-12 appeared at trial, albeit not in cigarette form but rather in a metal container containing tobacco and the tobacco paper. (Exh. 97.) This disappearance and reappearance of V-12 is similar to the disappearance and reappearance of A-41, the blood spot which was also supposedly exhausted, only to reappear when further testing was needed. (Exhs. 12, 153.)

Given this evidence of mishandling, it is a permissible inference that the cigarette butt tested for DNA was not actually the butt introduced at trial; that the tested butt had not been found in the Ryens' car in Long Beach; or that, in any event, the cigarette butt evidence had been so mishandled as to render any DNA test, at the very least, unreliable.

C. Slonaker Declaration

In a declaration dated February 7, 2004, Christine Slonaker provides new information about the night of the Ryen/Hughes murders. (Exh. 212.) Slonaker recounts that on that night, she was with two friends at the Canyon Corral Bar in Chino Hills, and two men came into the bar. "Both men were Caucasian and had blond hair. One of them was wearing a light colored t-shirt and jeans. The other man was wearing overalls. Both men were wearing tennis shoes . . . they appeared to be under the influence of drugs." From afar, she thought that they were covered in mud, but they approached her and her friends, and while they were engaged in conversation, Slonaker realized that it was not mud. "The spots on them were blood. Most of the blood was on their shoes and the front portion of their clothes. They also had blood splatters on their face and arms." Slonaker recalls asking them: "Do you realized you are covered

in blood?" One of Slonaker's friends also told one of the men: "Get off of me. You're covered in blood."

Slonaker recounts that the men were refused service, and escorted out of the bar. Shortly thereafter, a police officer arrived at the bar. The following morning, Slonaker heard about the Ryen/Hughes murders, but did not report what she had seen because she assumed that the police had been aware of the two strange men after seeing an officer that night at the bar.

The Slonaker declaration is a new piece of evidence suggesting that someone other than Cooper committed the Ryen/Hughes murders. It corroborates and reinforces evidence discussed below.

IV. Other Evidence

The newly discovered evidence, particularly the *Brady* evidence introduced by the Carroll declaration, substantially changes the State's case against Cooper. Under either 28 U.S.C. § 2244(b)(2)(B)(ii) or *Schlup*, our task is to evaluate the newly discovered evidence in light of all the other evidence in the record. In the material that follows, I summarize both evidence that was presented at trial and evidence that has been unearthed since then. Viewing the totality of this evidence in light of the Carroll declaration, I conclude that Cooper has made out a *prima facie* case that entitles him to file his second or successive petition for habeas corpus.

Warden Carroll's declaration casts doubt on the authenticity of the shoe print on the sheet taken from the Ryens' bedroom. The State knew from Warden Carroll that the prison did not have special prison-issue shoes. Nevertheless, the State put on witnesses testifying to precisely the contrary. William Baird, the Crime Laboratory Manager, testified that he had a "Pro-Ked Dude" shoe in his lab, to which he matched the "Pro-Ked Dude" print on the Ryens' sheet. But we now know from

Warden Carroll that it was highly unlikely for there to have been a "Pro-Ked Dude" print on the sheet, because "Pro-Ked Shoes" are special-issue prison shoes. We also know from Warden Carroll that Cooper could not have had such shoes, and we know that there is no reasonable possibility that anyone else would have had such shoes. Failing to turn over this information was a clear *Brady* violation, and the reliability of the "Pro-Ked Dude" evidence was undermined.

The following is the evidentiary picture into which we must fit this new knowledge. We know that during the night of June 4, 1983, the members of the Ryen household were viciously attacked, and that four out of the five members of the household were killed. Josh, the Ryens' eight-year-old son, survived. Josh had been cut in the throat and was unable to speak when he was first taken to the hospital. But he was able to communicate by pointing to letters and numbers. He told his interviewers that three or four men had done the killings. (Exhs. 53, 54, and 55.) He was separately asked if any of the men were black or had dark skin. He said no. (Exh. 53.) While still in the hospital, he saw a picture of Cooper on television. He said that Cooper had not done it. (Exh. 60.) Detective Hector O'Campo took notes of the interviews. He left out of his notes Josh's statements about multiple killers. (Exh. 68.) Several other people in the hospital (including a nurse, a doctor, and his grandmother) heard Josh say that there were multiple killers, and that he had never seen Cooper before. (Exhs. 57, 59, 61.)

A year and a half later, Josh testified by videotape that Cooper had done the killing. At trial, he recounted seeing a man with a "puff of hair." At the time of his arrest, a month and a half after the murders, Cooper wore his hair in an Afro; Cooper was seen on television at the time of his arrest in his Afro. However, at the time he escaped from prison, Cooper wore his hair in braids. (Exh. 73.) There were no recovered

hairs from a black person in the Lease house, indicating that Cooper had not combed out his braids in the house. (Exh. 167.)

The pathologist who performed autopsies on the victims initially believed that multiple people had done the killings, given the number and varied nature of the wounds. (Exh. 63.) He later testified that the killings could have been done by a single person, and testified that he only considered this after it was suggested to him by investigating officers. (Exh. 63.)

A blood-stained hatchet was found beside the road some distance from the house. A beige Fruit-of-the-Loom t-shirt was also found beside the road (at a different location) about 3 days after the killings. Cooper did not have such a t-shirt when he left prison, and the owner/occupants of the Lease house had no such t-shirt. (Exh. 29.) There was also no evidence that the t-shirt came from the Ryen house.

The Ryens kept a truck and a brown station wagon in their driveway. They left their keys in the ignitions of both vehicles. (Exh. 78.) After the murders, the brown station wagon was missing. It was found several days later (different witnesses testify to different dates) in a church parking lot in Long Beach. (Exh. 17.) Long Beach is on the coast, just south of Los Angeles. It is almost 50 miles due west of Chino Hills. Tijuana, where Cooper checked into a hotel at 4:30 pm on June 5, is just across the border into Mexico, slightly over 100 miles south of Chino Hills.

Nothing appears to have been taken from the Ryen house. Money left exposed on the counter remained. (Exh. 79.) Peggy Ryen's purse, containing money and numerous credit cards, was left undisturbed. (Exh. 78.)

The police testified that the following things were found in the Lease house: hand-rolled cigarettes butts with a type of tobacco issued in California prisons; a blood-stained button

consistent with those found on jackets issued by California prisons; a blood-stained hatchet sheath; and evidence that there might have been some washed-away blood (visible through the use of "Luminol") in the shower and sink, and in spots in the hall that could have been footprints.

Although Cooper smoked many hand-rolled cigarettes while he was in the Lease house, only one was logged into evidence. (Exhs. 33, 167.) As discussed above, the State's handling of the cigarette butt evidence was dubious. The hatchet sheath was found in plain sight on a bedroom floor during a second search of the Lease house, but that was after it had been searched previously and the sheath was not detected. The police officer who had previously searched the bedroom denied that he had been in it; however, his fingerprints were found on a closet in the bedroom.

The evidence presented by the State of washed-away blood is also weak. Luminol reacts to blood, but also to certain metals, vegetable matter, and cleaning agents. It is impossible to tell without follow-up testing which of the possible reactants is causing the reaction. Furthermore, Luminol is extremely sensitive, detecting at a sensitivity level of between 1 part per million and 1 part per ten million. It can detect reactants that have existed unnoticed for years and after many washings. The fact that Luminol reacted with the sink and shower does not even establish clearly that there was any blood in them, let alone when it had been deposited.

Cooper's blood was not found in the Ryen house, except (perhaps) on the disputed spot on the wall in the hallway, A-41. That spot was tested and mishandled by state criminalist, Daniel Gregonis, as described above.

Not only is the evidence that was presented by the State at trial weak, there is also considerable evidence that the Ryen/Hughes murders were committed by three other men. In

a declaration dated November 21, 1998, Diana Roper told the following story which was never presented at trial: during the early morning hours on the night of the murders, her thenboyfriend, Lee Furrow, came home, in a car driven by others. "Lee and Debbie walked through the front door. They were in a hurry. I heard the car depart. Lee was wearing long sleeve coveralls with a zipper in the front. The coveralls were splattered with blood . . . . He did not have the beige T-shirt or Levis on that he was wearing earlier in the day." (Exh. 82.) Furrow left the coveralls and quickly departed with Debbie on a motorcycle. (*Id.*)

Roper recounted that the bloody t-shirt introduced into evidence was similar to the t-shirt Furrow had worn the day of the murders: "The T-shirt in this photograph looks exactly like the T-shirt Lee was wearing on June 4, 1983 including the manufacturer, the size, the color and the pocket. I am absolutely positive the photograph of this T-shirt matches the T-shirt that Lee was wearing at our house the afternoon of June 4, 1983." (*Id.*) According to Roper, this was the same t-shirt she had previously bought for Furrow.

It is unclear, by contrast, how Cooper would have obtained a t-shirt like the one later found bloodied. No Fruit-of-the- Loom t-shirts were distributed at the prison. The occupants of the Lease house have provided evidence that none of them had such a t-shirt. And there was no such t-shirt in the Ryen house.

Roper also thought that she recognized the hatchet: "[A] few days after the murders I heard on the news that a hatchet was found near the crime scene in Chino. I immediately walked to the washer area of our house. Lee's hatchet was missing. . . . The hatchet [introduced into evidence at the trial] looks like the hatchet . . . , which I found missing after the Ryen/Hughes murders. I cannot say for sure if it is the same hatchet that Lee owned but the curvature of the handle is the same. Even more

striking in similarity than the curvature of the handle is the style of the handle, which has a sort of an American Indian pattern to it." (*Id.*)

In the same declaration, Roper recounted: "Prior to meeting me, Lee was convicted of the murder of Mary Sue Kitts. Lee confided in me that he not only killed Mary Sue Kitts, but he also dismembered her body and threw the body parts in the Kern River." (*Id.*) Furrow strangled Mary Sue Kitts at the direction of Clarence Ray Allen. *People v. Allen*, 42 Cal. 3d 1222, 1237-38 (1986). Allen is currently held under sentence of death in a California prison.

Roper's sister Karee Kellison was in the house with Roper that night. In a declaration dated November 15, 1998, Kellison recounted the same story about the arrival and departure of Lee and Debbie. "Lee was wearing long sleeve coveralls, which were spattered with blood." (Exh. 197.) She also recounted, "I saw Lee and Debbie get out of a car. There was not sufficient light to identify who the other occupants in the car were. However, there was enough light to see that it was a station wagon, kind of brown in color." (*Id.*)

Christine Slonaker's February 7, 2004 declaration, (Exh. 212.), corroborates Roper's and Kellison's accounts of the night of the Ryen/Hughes murders. Slonaker encountered two Caucasian men — one wearing a light-colored t-shirt — at the Canyon Corral Bar in Chino Hills on the night of the murders, both of whom were covered in blood. Slonaker's account is supported by pre-existing evidence from Canyon Corral Bar employees. The bartender and manager testified that Causasian men, whom they described as being extremely inebriated, had been in the bar on the night of the murders, one wearing a light-colored or beige t-shirt. (Exhs. 30, 31.) The bartender testified that the men were refused service and asked to leave the bar, corroborating Slonaker's account.

After Roper heard about the murders, Roper called her father to ask him to come to her house to confirm her opinion that they were spattered with blood. He agreed with her that they were. Five days after the murders, Roper gave the coveralls to Detective Eckley and told him that she thought they were connected to the Ryen/Hughes murders. Eckley then contacted Detective Benge, who instructed him to write a report and forward it to Sergeant Arthur, the chief investigating officer in the homicide division. (Exh. 194.) On June 10, 1983, Sergeant Stodelle told Arthur about the contents of Eckley's report about the coveralls. (Exh. 200.) Eckley's report clearly recounts Roper's story that Furrow had come home with the bloody coveralls on the night of the murder; that he had left them in the closet at her house; that he had been paroled three years before from his sentence for killing Mary Sue Kitts; and that she believed that the coveralls were connected to the Ryen/Hughes murders. (Exh. 194.)

Arthur made no attempt to recover the coveralls from Eckley. (Exh. 83.) Eckley made several attempts to contact the homicide division in June and July 1983, but his telephone calls were not returned. (Exh. 185.) The preliminary hearing in Cooper's case began on November 9, 1983. On December 1, the day the defense began its presentation, Eckley threw away the coveralls in a dumpster. (Exh. 185.) In May 1984, the Kellison-Roper family contacted Cooper's trial counsel about the coveralls. This was the first information he had received about them. It was not until December 1998 that an investigator for Cooper discovered a disposition report for the coveralls. It contained the initials "K.S.," which suggests that Eckley did not act independently in disposing of the coveralls.

Independent information given investigators in 1984 by Anthony Wisely, then an inmate at Vacaville, develops more fully the account provided by Roper and Kellison. Wisely told Detective Woods on December 19, 1984, that he had smoked marijuana with a certain Kenneth Koon while in prison. (Exh.

85.) He recounted to Woods that Koon had told him that he had participated in the Ryen/Hughes murders. (*Id.*) Roper was romantically involved with both Koon and Furrow around the time of the murders.

In his report, Woods wrote that Wisely told him that Koon told him the following. Koon was with two other men that were in the BRAND or the Aryan Brotherhood, and they had driven to a residence in Chino on the night of the Ryen/Hughes murders. Two men got out of the car and were in the house for about ten or fifteen minutes. One of the men was carrying two axes or hatchets, and also was wearing gloves. When the men returned to the car, one of them stated that "the debt was officially collected." Wisely said that "Koon thinks they hit the wrong house[.]" Koon said that one of the men involved "was very upset because they apparently had left one kid alive." (Exh. 85.)

Roper stated in her declaration, "I heard Lee say many times there are three rules to follow anytime you do a crime. They are wear gloves, never wear your own shoes and never leave a witness alive." (Exh. 82.) Nikol Gilberson, in a declaration signed November 21, 1998, stated that she was Lee Furrow's girlfriend from late 1983 to late 1984. She recounted in her affidavit that Lee Furrow "on several occasions" told her these same three rules.

This evidence against Cooper, taken as a whole and viewed in the light of the State's *Brady* violation, is extremely weak. There is also a plausible story told by Roper, Kellison, Slonaker and Koon (told through Wisely) that the true murderers are Furrow, Koon and another person. Cooper has clearly made out a *prima facie* case that entitles him to file his second or successive petition for habeas corpus.

V. Conclusion

Based on the foregoing I would authorize Cooper to file his proposed petition for habeas corpus. I would also grant a stay of execution.

ORIGINAL

ORIGINAL

No. [redacted] (3)

03-1328

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

JEANNE WOODFORD, PETITIONER,

v.

KEVIN COOPER, RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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The Respondent, Kevin Cooper, requests leave to file the attached Brief in Opposition to Petitioner's petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Respondent's counsel is aware that Respondent was previously granted leave to proceed *in forma pauperis* in the California Supreme Court, the United States Court of Appeals for the Ninth Circuit.

An affidavit from Kevin Cooper is further attached in support of this motion.

Dated: April 16, 2004

Respectfully submitted,

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No. 04-70578

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An affidavit from Kevin Cooper is further attached in support of this motion.

Dated: April 16, 2004

Respectfully submitted,

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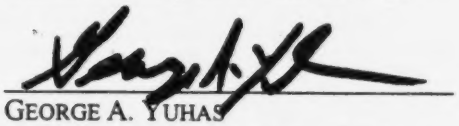

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In the Supreme Court of the United States

JEANNE WOODFORD, PETITIONER,

v.

KEVIN COOPER, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

1. Whether the limitations in 28 U.S.C. Section 2244(b) on a party's ability to file a rehearing petition from a determination of whether a *habeas* petitioner has satisfied the standards for filing a successor petition preclude a court of appeals from *sua sponte* correcting a panel's erroneous application of that provision.

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28 U.S.C. § 2244(b) ..... passim

No. 04-70578

In the Supreme Court of the United States

JEANNE WOODFORD, PETITIONER,

v.

KEVIN COOPER, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Kevin Cooper respectfully submits this brief in opposition to Petitioner's Petition for Writ of *Certiorari*.

STATEMENT OF THE CASE

On February 9, 2004, the Ninth Circuit Court of Appeals, on its own motion, vacated the three-judge panel's two-to-one decision denying Mr. Cooper – Respondent in this action – authorization to file a successor petition.[1] *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (*en banc*). Thereafter, an eleven-member *en banc* panel heard the matter and, by a nine-to-two vote, issued an order concluding that Mr. Cooper had satisfied the requirements of 28 U.S.C. Section 2244(b)(3) and authorized the filing of the successor petition. *Id.* In so doing, the Ninth Circuit expressly determined that Section 2244(b)(3)(E)'s limitations on a

[1] The Antiterrorism and Effective Death Penalty Act of 1996 amended Section 2244(b)(3) of Title 28 ("AEDPA") to provide that the Court of Appeals act as the gatekeeper for the filing of successor *habeas* petitions in federal court. The "new restrictions on successive petitions constitute a modified *res judicata* rule, a restraint on what used to be called in habeas corpus practice 'abuse of the writ.'" *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998) (quoting *Felker v. Turpin*, 518 U.S. 651, 657, 664 (1996)).

party's ability to seek rehearing and *certiorari* review of a panel's decision did not remove the court's jurisdiction to rehear such a decision *sua sponte*.

In response to the Ninth Circuit's actions, the Warden, Petitioner in this proceeding, immediately moved this Court for an order vacating the stay of execution. *Woodford v. Cooper*, Case No. 03A687.[2] The Warden predicated her motion on her belief that "the Ninth Circuit's undertaking [was] a level of review that congressional reform precludes Cooper himself from seeking in the Ninth Circuit or this Court." Application to Vacate Stay of Execution of *En Banc* Panel] at 2. Specifically, the Warden argued that Section 2244(b)(3)(E)'s limitation on a party's ability to seek rehearing also deprived the Ninth Circuit of its authority *sua sponte* to hear the matter *en banc*. *Id.* at 9. This Court denied the Warden's Application without comment. *Woodford v. Cooper*, ___ U.S. ___, 124 S.Ct. 1197 (2004).

The Warden then returned to this Court, seeking to stay the mandate of the Ninth Circuit and thus delay the resolution of the claims in Mr. Cooper's successor petition pending the filing of a petition for writ of *certiorari*. Mr. Cooper opposed the application, arguing that the Warden was seeking merely to relitigate the issue unsuccessfully presented in her previous application. On March 1, 2004 this Court denied the Warden's application.

Now the Warden appears before this Court for the third time, seeking a writ of *certiorari*. The Warden's interpretation of 28 U.S.C. Section 2244(b)(3) and insistence that Congress withdrew the Ninth Circuit's inherent jurisdiction to correct erroneous decisions of a three-judge panel is without any support. The Ninth Circuit acted in accordance with the provisions of the AEDPA. Accordingly, Petitioner has not presented a question suitable for review.

REASONS FOR DENYING THE PETITION

The *en banc* decision below represents the Ninth Circuit's error-correcting

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[2] The Warden filed two such applications on February 9, 2004. The first was filed prior to the issuance of the *en banc* decision of the Ninth Circuit. *Cooper v. Woodford*, Case No. 03A686. The grounds raised in support of both applications were virtually identical.

function, as authorized by federal statute. The panel's *sua sponte* motion to rehear Respondent's application for authorization to file a successive *habeas* petition presents no deviation from accepted protocol. The circuits that have addressed *sua sponte* review of applications under 28 U.S.C. § 2244 have unanimously reasoned that such action is within the power of the courts of appeals. Petitioner's attempt to characterize the question presented as "vitally important to the interests of the states in enforcing their criminal laws" (Petition at 5) ignores the simple fact that there is no conflict among the circuits with respect to this question. The plain language of Section 2244 allows for the action taken by the Ninth Circuit in this case, and raises no question of statutory misinterpretation.

I. THE WARDEN HAS PRESENTED NO ISSUE WORTHY OF PLENARY REVIEW, AS THE NINTH CIRCUIT WAS WELL WITHIN ITS AUTHORITY TO *SUA SPONTE* GRANT REHEARING OF THE PANEL'S DECISION

The Warden has failed to present a question worthy of a grant of review.[3] As a matter of judicial discretion, a writ of *certiorari* is not permitted as of right. Supreme Ct. R. 10. A petitioner must present a question of importance to the public, a "real and embarrassing conflict of opinion and authority between the courts of appeals." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). The Warden, on her third attempt before this Court, fails to present such a question.

The Warden's petition somewhat misleadingly argues that a "sharp division has arisen among the judges of two circuits concerning this questionable exercise *en banc* authority." Petition at 6. In support of her assertion of "a sharp division," the Warden cites to *In re Byrd*, 269 F.3d 585 (6th Cir. 2001) and *Thompson v. Calderon*, 151 F.3d 918 (9th Cir. 1998). Far from evidencing a "sharp split" between the Sixth and Ninth Circuits, the majority and concurring opinions in these decisions uniformly concluded that the circuit courts have the

---

[3] Section 2244 explicitly prevents parties from petitioning this Court for a writ of *certiorari* following the grant or denial of an authorization by the Court of Appeals to file a successive *habeas* application 28 U.S.C. § 2244(b)(3)(e). The Warden's current petition directly involves such authorization. To grant the petition would call into question a circuit court's ability to define its own procedural mechanisms with respect to *en banc* rehearings.

power to engage in *sua sponte en banc* review. Thus, there is no split at all between or among the circuits. What the Warden is referring to, disingenuously perhaps, is that an individual judge in each case disagreed by dissent. That does not constitute a split among the circuits.

A. The Plain Language of the Statute Permits *Sua Sponte En Banc* Review

The entirety of the language in Section 2244 pertaining to rehearing is contained in subsection (b)(3)(E), which states, "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). With respect to rehearings, the statute by its own terms prohibits only *petitions* for rehearing. Circuit courts, however, have extended the reach of the statute to preclude not only petitions for rehearing, but also petitions for rehearing *en banc*. *In re King*, 190 F.3d 479 (6th Cir. 1999); *United v. Lorensten*, 106 F.3d 278 (9th Cir. 1997). Nothing in the AEDPA, however, removed the inherent power of a court of appeals to correct an erroneous three-judge panel decision on its own motion. Furthermore, every court to examine the issue has concluded that a court of appeals retains the authority to reconsider, *sua sponte*, a panel's decision. *See Cooper v. Woodford*, 358 F.3d at 1118; *In re Byrd*, 269 F.3d 585 (6th Cir. 2001); *Triestman v. United States*, 124 F.3d 361, 366 (2d Cir. 1997).

In *Triestman v. United States*, 124 F.3d 361, 366 (2d Cir. 1997), the court addressed the question of whether it had the authority to order a rehearing *sua sponte*. In answering the question in the affirmative, the court concluded that Section 2244(b)(3)(E) "provides only that a disappointed litigant may not ask the court to reconsider its certification decision. By its plain terms, it does not purport to limit the court's own power to review its decisions or to undertake a rehearing." *Id.* at 367. Thus, the *Triestman* court held that "under the AEDPA, a court of appeals retains the authority to order a rehearing *sua sponte*." *Id.*

The *Triestman* interpretation of Section 2244 comports with the purpose behind the statute. As explained in the later decisions of *In re Byrd* and *Thompson v. Calderon*, the purpose of the statute is to limit requests for review by *petitioners*. The statute does not, and

makes no effort to, encroach upon the inherent function of the circuit courts as reviewing courts. *See, e.g., Irving v. United States*, 162 F.3d 154, 161 (1st Cir. 1998) ("This authority to overrule the decision of a prior panel in the same case flows logically from the error-correction function of the full court."). "While this section clearly prohibits a petitioner from requesting a rehearing, nothing in its test bars a federal appellate court from rehearing a matter *en banc* upon its own motion." *In re Byrd*, 269 F.3d at 591 (Cole, J. concurring). Similarly, the court in *Thompson*, citing *Triestman*, held that the language of Section 2244 "does not preclude *sua sponte* review by an *en banc* court. It merely precludes the parties from seeking a rehearing." *Thompson v. Calderon*, 151 F.3d 918, 922.

B. Well-Established Interpretation of the Judiciary's Inherent Powers Supports *Sua Sponte En Banc* Review

In addition to the plain language of the statute, well-established interpretation of the judiciary's inherent powers supports *sua sponte en banc* review. In support of her position that the courts of appeals lack this *sua sponte* authority, the Warden cites and compares the following language from 28 U.S.C. Section 2244(b)(3):

> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> . . . .
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

The Warden asserts that subsection (B), requiring the application to be decided by a three-judge panel, and subsection (E), limiting a party's ability to seek further review of a three-judge panel's decision, represents Congress's intention to divest the court of appeals, and presumably this Court, of the inherent power on their own motion, to correct erroneous decisions by three-judge panels. The Warden's claim, rejected by this Court in the denial of her motion to vacate and her motion to stay the mandate, misperceives the limitations that

Congress intended in enacting Section 2244(b)(3)(E).

Although Congress may eliminate appellate jurisdiction altogether over certain cases, *Ex Parte McCardle*, 74 U.S. 506 (1868), such limitations do not deprive the courts as established by Congress of the core judicial power in Article III: to decide what the law is. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Article III judicial power to say what the law is upon which the legislation may not intrude, is "deeply rooted in our law") (citing *Marbury v. Madison*, 5 U.S. 1 (1 Cranch) 137, 177 (1803)). The judicial power granted in sections 1 and 2 is the power to declare law, and although section 2 states that Congress may limit appellate jurisdiction (the Regulations and Exceptions Clause), Congress may not infringe upon the courts' exclusive right to interpret statutes and determine jurisdiction facts. *See Kuhali v. Reno*, 266 F.3d 93, 100 (2d Cir. 2001) (jurisdiction to determine jurisdiction derives from inherent Article III powers); *Mugalli v. Ashcroft*, 258 F.3d 52, 55 (2d Cir. 2001) ("the determination of jurisdiction is exclusively for the court to decide") (citation omitted).

Even in cases in which Congress may limit a federal court's jurisdiction, such limitations must be expressly and unequivocally made:

> We emphasized in *Johnson v. Robinson*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Id.*, at 373-74, 94 S.Ct. at 1168-69. In *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), we reaffirmed that view. We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12, 106 S.Ct. 2133, 2144 n.12, 90 L.Ed.2d 623 (1986).

Webster v. Doe, 486 U.S. 592, 603 (1988); *see also Castro v. United States*, ___ U.S. ___, 124 S.Ct. 786 (2003) (recognizing that courts' doors may not be closed to *habeas* petitioners "without any clear indication that such was Congress' intent").

Although the Warden cites to this Court's decision in *Castro*, she ignores that, in that case, this Court interpreted the AEDPA in a manner that recognizes federal court

jurisdiction absent "clear indication" that Congress intended to remove such jurisdiction. *Id.* at 792. Unquestionably, Congress did not clearly indicate its desire to remove the inherent power of the Court of Appeal *sua sponte* to correct erroneous decisions of three-judge panels. Congress merely intended that the application be submitted to a three-judge panel and to preclude a party from seeking rehearing and *certiorari* from the panel's decision. Thus, it is not surprising that the courts of appeal are unanimous in holding that they retain the "authority to order a rehearing *sua sponte*, despite the provision in Section 2244(b)(3)(E)." *Cooper*, 358 F.3d at 1117; *In re Byrd*, 269 F.3d at 588; *Triestman*, 124 F.3d at 366. In light of this clear authority, the Warden offers no support for her view that the Ninth Circuit lacked the inherent authority to correct the decisions of its three-judge panel.

The question presented by the Warden's Petition for Writ of *Certiorari* fails to present an issue of importance to this Court. Whether a Court of Appeals has the authority under 28 U.S.C. Section 2244 *sua sponte* to order a rehearing *en banc* is decided uniformly among the circuits that have addressed the matter. While the Warden attempts to create a conflict by citing differences among *judges*, it is clear from the cases she cites that any disagreement with the majority decisions has been expressed by dissenting judges whose opinions carry no binding or persuasive weight. The plain language of the statute and the intentions of the federal judiciary prevent parties from petitioning for rehearings and rehearings *en banc*, but do nothing to constrain the ability of courts of appeals to act on their own motion.

II. DENIAL OF THE WARDEN'S PETITION WOULD NOT AFFECT SOCIETY'S INTEREST IN FINALITY

The Warden argues in her petition that "[r]esolution of the question presented in this Petition is important to maintaining the respect of citizens for the ability of the courts to punish the guilty" (Petition at 11), implying that the recognition of a circuit court's *sua sponte* power to order *en banc* review undermines society's interest in finality of judgments. In making this argument, the Warden overlooks that the fundamental function of *en banc* review

is to correct error by the three-judge panel. By exercising *sua sponte* discretion in this instance, nine out of eleven judges on the *en banc* panel reversed an erroneous opinion, an opinion that would have led to the execution of Mr. Cooper before all claims establishing his potential innocence had been presented to the proper court.[4]

The Warden belabors the time that would be wasted by allowing circuit courts to continue this practice. The reality of the situation, however, is that the Ninth Circuit took less that 24 hours to issue its *en banc* ruling following the three-judge panel opinion. This process alone did nothing to delay Mr. Cooper's execution. Had the *en banc* panel affirmed the three-judge decision, Mr. Cooper's execution would most likely have moved forward as scheduled on February 10, 2004. Instead, the *sua sponte* vote provided the court the opportunity to correct its own error.

While finality of judgments is important, and the emotions of the victims and their families carries great significance, there is no finality more grave than that of an execution. The Warden has made no showing that circuit courts have abused their *sua sponte* power under section 2244, or even invoked it on a regular basis. Rather, it has been used judiciously, in situations such as Mr. Cooper's where a majority of judges seek to correct a mistake. Eliminating the ability of circuit courts to take such action serves no purpose, other than to ensure that future errors remain unchallenged.

---

[4] The *sua sponte* power of a circuit court to review a three-judge panel's decision is not limited to reviewing orders denying a habeas petitioner's right to file a successor petition. Accepting the Warden's position and concluding that a circuit court lacks the authority to correct erroneous authorizations to file a successor petition produces the very delay that the Warden seeks to avoid. The question is not whether the mechanism for correcting erroneous decisions is permitted, but rather whether that mechanism employed the correct standard in reaching its decision. In this case, there is no question that the Circuit Court correctly concluded that Mr. Cooper was entitled to file a successor petition.

CONCLUSION

For these reasons, the Warden's Application to Stay Mandate of the United States Court of Appeals for the Ninth Circuit Pending *Certiorari* should be denied.

Dated: April 16, 2004

Respectfully submitted,

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No. 03-1328

IN THE

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

vs.

KEVIN COOPER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a three-judge panel of the Court of Appeals has decided a motion to authorize a successive habeas petition under 28 U. S. C. § 2244(b)(3), does the Court of Appeals have authority to reconsider that decision en banc?

IN THE

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

vs.

KEVIN COOPER,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation* respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition for writ of certiorari in this case. Counsel for petitioners has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim

* This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attempt to evade Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in the enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. Implementation of the law would advance the rights of victims and society which CJLF was formed to protect.

April, 2004

Respectfully submitted,

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Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

vs.

KEVIN COOPER,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

"This case . . . chronicles the nocturnal massacre of a mother, father, daughter, and houseguest in the sanctity of their home, and the attempted murder of the young son, the only person to survive." *People* v. *Cooper*, 53 Cal. 3d 771, 793, 809 P. 2d 865, 874-875 (1991). "The jury convicted defendant of hacking to death Douglas (Doug) and Peggy Ryen, their 10-year-old daughter, Jessica, and an 11-year-old houseguest, Christopher Hughes (Chris), inside the Ryen home near . . . a state prison in Chino [California]. Eight-year-old Joshua Ryen (Josh), although severely injured, survived. Two days before this execution of the innocent, defendant had escaped from" the prison. *Id.*, at 794, 809 P. 2d, at 875. Nor was this Cooper's first crime of brutality. In 1982, "defendant burglarized a home in Pennsylvania, assaulted a high school student who interrupted the burglary, kidnapped her, and raped her. During the incident, defendant attempted to steal one vehicle, and did steal

the rape victim's vehicle." *Id.*, at 802, 809 P. 2d, at 880. Cooper's guilt of the Pennsylvania offenses was uncontested. See *ibid.*

The California Supreme Court affirmed the conviction and death sentence on direct appeal, *id.*, at 849, 809 P. 2d, at 912, and this Court denied certiorari. *Cooper* v. *California*, 502 U. S. 1016 (1991). The judgment has been "final," see *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994), for over *twelve years*, yet it remains unexecuted.

Cooper filed habeas corpus petitions in both the Federal District Court and the California Supreme Court. See *Cooper* v. *Calderon*, 255 F. 3d 1104, 1108 (CA9 2001) (*per curiam*). The state petition was denied on February 19, 1996, and the federal petition was denied on August 25, 1997. See *ibid.* The Court of Appeals affirmed the federal denial in an unpublished memorandum decision on December 15, 2000. See *id.*, at 1017, n. 2. On petition for rehearing, the panel replaced that decision with a published opinion July 9, 2001. See *ibid.* The Court of Appeals took another six months to deny rehearing en banc. This Court denied certiorari on October 7, 2002. *Cooper* v. *Calderon*, 537 U. S. 861 (2002).

Meanwhile, on April 30, 1998, Cooper had filed a post-AEDPA[1] petition, which the District Court dismissed as successive. See *Cooper* v. *Calderon*, 274 F. 3d 1270, 1272 (CA9 2001). The Court of Appeals "construe[d] Cooper's request for a certificate of appealability as a request for authorization to file a second or successive petition pursuant to 28 U. S. C. § 2244(b)(3)(A)." *Id.*, at 1275. The court then denied the request for not meeting the statutory requirements for a successive petition. See *ibid.* The court found it unnecessary to decide whether the lapse of over two years from denial of the state petition to the filing of the second federal petition made

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1. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (effective Apr. 24, 1996).

the latter untimely under AEDPA's statute of limitations. See *id.*, at 1257, n. 3. Cooper petitioned for rehearing, and the panel dismissed the petition as unauthorized under 28 U. S. C. § 2244(b)(3)(E). *Cooper* v. *Calderon*, 308 F. 3d 1020, 1021 (CA9 2002). Further reconsiderations and modifications took until November 13, 2002, over four and a half years from Cooper's first filing in the District Court. The decision that Congress mandated be completed in *one* month, see 28 U. S. C. § 2244(b)(3)(D), had taken over 54 months.

Concurrently with the Ninth Circuit proceedings described above, Cooper sought DNA testing from the state courts. By statute, California makes generous provisions for DNA testing. See Cal. Penal Code § 1405. Despite serious doubt regarding whether Cooper could meet the statutory "reasonable probability" requirement, see § 1405(c)(1)(B), the People entered into an agreement for DNA testing on May 10, 2001. See San Bernardino District Attorney's Brief in Response to Clemency Petition 18 (2004) ("Clemency Response").[2] "Numerous items of evidence were shipped to the crime lab at DOJ Berkeley from *two locations*; the San Bernardino County Sheriff's Property Division and the San Diego County Superior Court Evidence Locker." *Id.*, at 19 (emphasis added). The two locations are important, as explained below.

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2. For convenience and for the information of the public, we have placed this document on our Web site at http://www.cjlf.org/deathpenalty/CooperResponse.pdf. The table of contents is a separate document at http://www.cjlf.org/deathpenalty/Coopertbl.pdf. The State's response to Cooper's successive petition application, which also refutes his claim of actual innocence, is available at http://www.cjlf.org/deathpenalty/CooperSuccOpp.pdf.

As so often happens in these cases,[3] the DNA test that Cooper claimed would prove his actual innocence instead provided powerful confirmation of his actual guilt.

> "These DNA results provided additional evidence of Cooper's guilt. Specifically the results established that Cooper was the donor of the DNA found on the following items; a bloodstain in the Ryen home near the master bedroom where the victims were attacked, two cigarette butts found in the stolen Ryen station wagon when it was recovered in Long Beach, and on a tee shirt found on the side of a road within two miles of the Ryen home. Partial DNA profiles matching that of two of the victims, Doug and Peggy Ryen were found on the same tee shirt. The DNA profiles of blood taken from the hatchet that was taken from the house where Cooper hid matched that of several of the victims including Doug, Jessica and Chris Hughes. (DOJ Crime Lab Report Sept 24, 2002 pp. 1-4, P. Ex. No. 5.)" Clemency Response 19.

The T-shirt has been the focus of most of the subsequent attention. The concurring judges in the Court of Appeals went so far as to say that "*[e]verything* comes down to the bloody t-shirt." *Cooper* v. *Woodford*, 358 F. 3d 1117, 1124 (CA9 2004) (en banc) (Silverman, J., concurring in part and dissenting in part) (emphasis added).

A portion of the T-shirt was cut out prior to trial. Clemency Response 51. The main portion has been in San Diego in the custody of the court since the trial in 1985. Law enforcement personnel have had no access to it. See *id.*, at 52. Claims regarding the chain of custody of the evidence at the San Bernardino County Sheriff's Property Division are therefore

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3. See, *e. g.*, *Coleman* v. *Thompson*, 798 F. Supp. 1209, 1213-1214 (W. D. Va. 1992), aff'd, 966 F. 2d 1441 (CA4 1992), stay denied, 504 U. S. 188 (1992) (*per curiam*), cert. denied, 504 U. S. 992 (1992); *O'Dell* v. *Netherland*, 95 F. 3d 1214, 1253 (CA4 1996), aff'd on other grounds, 521 U. S. 151 (1997).

irrelevant to the main portion of the T-shirt. This is the portion that was tested for DNA at the request of Cooper's team, not the prosecution, and was found to be a positive match to Cooper.

To believe that this blood was planted by San Bernardino law enforcement personnel, one would have to believe it was planted before trial, when forensic DNA testing was unknown, and then the planted evidence was not used at trial and was not designated for testing by anyone on the prosecution side at any time thereafter. The notion that someone would plant evidence and then not use it stretches credibility far beyond the breaking point. The state trial court rejected Cooper's claims, found he had made no showing of evidence tampering, and denied his request for further testing on July 1, 2003. Clemency Response 19-20.

Cooper also lodged the test results with the Ninth Circuit and again moved to file a successive petition. The court denied the motion. "Contrary to his predictions of exculpation, the DNA test results inculpate Cooper and support his conviction." *Cooper* v. *Calderon*, 2003 U. S. App. LEXIS 27035 (CA9, Feb. 18, 2003), reh'g denied, 2003 U. S. App. LEXIS 27036 (Apr. 7, 2003). The California Supreme Court also denied six writs of habeas corpus. See *Cooper* v. *Woodford*, 357 F. 3d 1019, 1022 (CA9 2004).

Governor Schwarzenegger also reviewed Cooper claims and denied clemency.

> "I also note that Mr. Cooper sought and obtained recent DNA testing evidence and, when that testing further proved his guilt, Mr. Cooper claimed that law enforcement authorities had tampered with the tested evidence. There are no facts which lead me to believe this claim has any merit." Office of the Governor, Press Release, Governor

Schwarzenegger Denies Clemency to Convicted Murderer Kevin Cooper (Jan. 30, 2004).[4]

Cooper then moved once again in the Ninth Circuit to file a successive petition. See 357 F. 3d, at 1020. The court noted that Cooper's claims were essentially a rehash of claims already rejected on his previous application and also rejected by the state trial court. See *id.*, at 1024-1026.

"In sum, neither singly nor in combination do these items establish Cooper's innocence, or show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. To the contrary, there was clear and compelling evidence that linked Cooper to the crime." *Id.*, at 1029.

The next day, the Ninth Circuit reconsidered the panel's decision en banc, claiming it had authority to do so *sua sponte* despite 28 U. S. C. § 2244(b)(3). See *Cooper* v. *Woodford*, 358 F. 3d 1117, 1118 (CA9 2004). The en banc court purported to grant the motion to file a successive habeas petition. See *id.*, at 1124.

SUMMARY OF ARGUMENT

The question of whether this Court has certiorari jurisdiction in this case merges with the merits. If the State's interpretation of the statute is correct, the decision shielded from certiorari review by 28 U. S. C. § 2244(b)(3)(E) is the decision of the three-judge panel under paragraph (B), not the unauthorized, illegal reconsideration of that decision en banc. Because this Court has jurisdiction to determine whether it has jurisdiction and to decide all questions included in that determination, it has jurisdiction on certiorari to decide the question presented.

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4. This press release is available on the Governor's Web site, http://www.governor.ca.gov.

Alternatively, if this Court should decide that paragraph (E) precludes review on certiorari, this is a textbook case for the extraordinary writs of prohibition or mandamus. As noted in the concurring opinions in *Felker* v. *Turpin*, review through these writs is not precluded by AEDPA. A federal court issuing an order it has no authority to issue calls for correction by one of these writs.

The doubtful legitimacy of the order issued in this case presents a question of exceptional importance that should be resolved by this Court. Nothing could be more damaging to the public's confidence in the courts and the legitimacy of their authority than lawlessness by the courts themselves. The substantial possibility that a federal court has defied an act of Congress and acted without authority raises a grave question calling for definitive resolution by this Court.

The power of a Court of Appeals to rehear cases en banc is generally granted by Congress in 28 U. S. C. § 46(c), but it has been withdrawn by Congress for this particular proceeding in 28 U. S. C. § 2244(b)(3)(B). Multiple rounds of litigation in successive petition cases is precisely what Congress intended to forbid when it created the gatekeeping mechanism.

ARGUMENT

I. This Court has jurisdiction to review the en banc order, either by certiorari or by extraordinary writ.

A. Certiorari.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress added subdivision (b)(3) to 28 U. S. C. § 2244 as follows:

> "(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for

an order authorizing the district court to consider the application.

"(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

"(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

"(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

"(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

Paragraph (E) of this subdivision raises an issue regarding this Court's jurisdiction to entertain the present certiorari petition. This is one of those peculiar cases where the question of jurisdiction merges with the question of the merits.

Felker v. *Turpin*, 518 U. S. 651 (1996) presented a somewhat similar question regarding the same statute. One of the questions was whether paragraph (E) "constitutes an unconstitutional restriction on the jurisdiction of this Court." *Id.*, at 658. If it did, the restriction would be invalid, and the Court would have certiorari jurisdiction. The habeas petitioner further contended that AEDPA unconstitutionally suspended the writ of habeas corpus. See *id.*, at 663-664. The *Felker* Court had to resolve the merits of these questions in order to uphold the validity of the statute, although ultimately coming to the conclusion it had no certiorari jurisdiction. See *id.*, at 665. A court has jurisdiction to determine if it has jurisdiction, and it may decide issues necessary to that resolution. See, *e.g.*, *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 585-586

(1999) (noting that rulings in the course of finding no jurisdiction may have preclusive effect in subsequent litigation).

Stewart v. *Martinez-Villareal*, 523 U. S. 637 (1998) construed the statute to permit review on certiorari when the question was not whether permission should be granted or denied under §2244(b)(3), but rather whether that provision applied at all. The habeas petitioner had moved for permission to file a successive petition, but the Court of Appeals decided that the petition was not successive. See *id.*, at 641. This decision was reviewable on certiorari. *Id.*, at 642.

The present case is one step closer than *Martinez-Villareal* to paragraph (E)'s no-certiorari zone, but it is still outside the zone. The en banc court did purport to grant permission to file a successive petition, but the State does not seek review of the merits of that decision. Instead, it asks whether the en banc court has the authority to decide it, a distinct question. Cf. *Castro* v. *United States*, 540 U. S. __, 157 L. Ed. 2d 778, 786, 124 S. Ct. 786, 791 (2003).

United States v. *Ruiz*, 536 U. S. 622 (2002) involved an appeal by a defendant who had pleaded guilty and wished to appeal only the sentence. In these circumstances, 18 U. S. C. § 3742(a) sharply limits appellate jurisdiction. The defendant claimed that her sentence was imposed "in violation of law," one of the statutory bases for appellate jurisdiction.

> "Although we ultimately conclude that respondent's sentence was not 'imposed in violation of law' and therefore that § 3742(a)(1) does not authorize an appeal in a case of this kind, it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction. See *United States* v. *Mine Workers*, 330 U. S. 258, 291 (1947). In order to make that determination, it was necessary for the Ninth Circuit to address the merits. We therefore hold that appellate jurisdiction was proper." *Ruiz*, 536 U.S., at 628.

So it is in the present case. In § 2244(b)(3)(E), Congress has shielded a decision from this Court's review via certiorari,

but which decision? If the State's interpretation of the statute is correct, the shielded decision is the decision of the three-judge panel. Certainly Congress would not have insulated from this Court's review an en banc redetermination that it intended to prohibit altogether.

Paragraph (B) requires that the motion "be determined by a three-judge panel of the court of appeals," and paragraph (E) says "[t]he grant or denial . . . shall not be the subject of a petition for rehearing or for a writ of certiorari." If the State's interpretation is correct, the "grant or denial" in paragraph (E) is the "determination" from paragraph (B). The action of the en banc court is an unauthorized, illegal *re*determination, not shielded from this Court's review. The question of jurisdiction thus merges with the merits.

B. Extraordinary Writs.

In the alternative, if certiorari is not available, then this is a textbook case for the extraordinary writs, either mandamus to require the Court of Appeals to reinstate the decision of the panel or prohibition to stop any further proceedings in the District Court. *Felker* held that the removal of certiorari jurisdiction did not preclude review by an original habeas writ, on the principle that "[r]epeals by implication are not favored . . . ." 518 U. S., at 660. On the same basis, § 2244(b)(3)(E) "does not purport . . . to limit [this Court's] jurisdiction under the All Writs Act, 28 U. S. C. § 1651." *Id.*, at 666 (Stevens, J., concurring). Indeed, interpretation of the statute to preclude such review would reopen "the question whether the statute exceeded Congress's Exceptions Clause power," *id.*, at 667 (Souter, J., concurring), which by itself is a good reason not to adopt such an interpretation. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988).

De Beers Consol. Mines, Ltd. v. *United States*, 325 U. S. 212 (1945) discussed the proper use of the All Writs Act, now 28 U. S. C. § 1651(a), which was then codified as § 262 of the

Judicial Code. See *De Beers*, *supra*, at 216. "When Congress withholds interlocutory reviews, § 262 can, of course, not be availed to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262." *Id.*, at 217.

If the State is correct on the merits, a matter which should be decided on full briefing and argument, then usurpation is precisely what happened here. Congress intended that after one full round of state and federal review, capital cases would proceed expeditiously to execution in all but the rarest cases. See *infra*, at 16-19. To achieve this goal, Congress vested the decision to allow another round in a three-judge panel of the Court of Appeals and prohibited review of that decision by the usual means (rehearing and certiorari), so that it would be final and no further stays would be granted in almost all cases. Subjecting the merits of the decision to scrutiny by the court en banc is the usurpation of a power which Congress has withdrawn. The State is injured by delay in executing its judgment while yet another round of litigation takes place, precisely the result Congress intended to prohibit.

The only other element needed for an extraordinary writ is the absence of any other remedy. The State believes that relief is available by certiorari under 28 U. S. C. § 1254(1). However, if the Court should decide otherwise, then all the conditions for employment of the All Writs Act are present.

II. The doubtful legitimacy of the power exercised in this case and the apparent evasion of the will of Congress make this an important issue which should be decided by this Court.

Most successful petitions for certiorari in this Court are based on a division of opinion in the federal courts of appeals and state high courts. See R. Stern, E. Gressman, S. Shapiro,

& K. Geller, Supreme Court Practice 225 (8th ed. 2002); Supreme Court Rule 10(a), (b). To date, no such conflict appears in the published opinions of the courts of appeals. However it does not appear that any circuit other than the Second, Sixth, and Ninth has reconsidered en banc the decision of a three-judge panel under 28 U. S. C. § 2244(b)(3).[5]

On a matter of lesser moment, it might be prudent to wait for other circuits to take an express stand, *i.e.*, to let the issue "percolate." See, *e.g.*, *Arizona* v. *Evans*, 514 U. S. 1, 23-24, n. 1 (1995) (Ginsburg, J., dissenting). However, Rule 10(c) recognizes that some questions of federal law are so important that they should be decided by this Court, even in the absence of conflicting decisions. This is one of those matters.

This Court has a long history of exercising scrupulous care regarding jurisdiction and insisting that other federal courts do the same. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94-95 (1998). The reason why jurisdiction is so important is that it goes to the heart of the legitimacy of judicial power. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 865 (1992), the Court explained, albeit in a somewhat different context, why it is so important that court decisions be legitimate and be perceived as such by the people.

> "The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows

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5. *In re Vial*, 115 F. 3d 1192, 1193 (CA4 1997) considered a successive petition request by a federal defendant en banc without a prior panel decision. That decision does not discuss or appear to be aware of the requirement of § 2244(b)(3)(B).

> itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."

Nothing could be more destructive to the essential public confidence in the judiciary than lawless behavior by the courts themselves. If courts ignore or evade acts of Congress and issue orders they have no legitimate authority to issue, the public confidence that is essential to the institutional integrity of the federal judiciary will be irreparably weakened.

In the present case, the State believes, with considerable justification, that the en banc court of appeals decided an issue it had no authority to decide, issued an order it had no authority to issue, and defied an act of Congress. It did so in a capital case, further delaying punishment for a heinous crime, where the DNA testing of the central evidence has already been done and has powerfully confirmed the defendant's guilt. A well-founded charge of judicial usurpation is a grave matter, calling for resolution by this Court.

III. The power to rehear en banc is granted by Congress and has been withdrawn by Congress.

A. § 46(c) and § 2244(b)(3)(B).

The concurring judges in *In re Byrd*, 269 F. 3d 585, 592-593 (CA6 2001) (Cole, J., concurring) thought that the power of an appellate court to reconsider a panel decision en banc was "inherent." That term can refer to a power that a court has in the absence of legislation, or it can refer to a power that Congress cannot remove without violating Article III of the Constitution. See *Carlisle* v. *United States*, 517 U. S. 416, 434 (1996) (Souter, J., concurring). If used in the first sense, the "inherent" nature of the power is irrelevant, since Congress has provided for rehearing en banc generally in 28 U. S. C. § 46(c), and the only question is whether 28 U. S. C. § 2244(b)(3) removes that general authority in this specific instance. To the

extent the *Byrd* concurrence thought the power was indefeasible, it is contrary to this Court's cases.

Prior to 1941, confusing and conflicting language in various statutes had created a conflict in the courts of appeals regarding whether they had the authority to hear cases en banc. See *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326, 327-331 (1941); *Western Pacific Railroad Case*, 345 U. S. 247, 253 (1953). *Textile Mills* resolved that split in favor of the authority, largely based on practical considerations. See 314 U. S., at 334-335. However, the Court noted, "Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting *en banc*. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation." *Id.*, at 335. Far from implying that Congress lacked the power to enact a contrary rule, as the *Byrd* concurrence does, *Textile Mills* implied the exact opposite.

In the 1948 revision of Title 28, Congress enacted § 46(c). "It was motivated by a dual purpose: to give express recognition to the doctrine of *Textile Mills*, while at the same time securing the tradition of three-judge courts against any further intrusion." *Western Pacific*, 345 U. S., at 254. "Because *§ 46(c) is a grant of power*, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power should be exercised." *Id.*, at 259 (emphasis added; footnote omitted). Congress granted the power, and Congress can take it away.

At this point, it is convenient to put the general and specific statutes side by side to see the similarities and differences:

28 U. S. C. § 46(c):

"Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . , *unless* a hearing or rehearing in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service . . . ." (Emphasis added).

28 U. S. C. § 2244(b)(3)(B):

"A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals."

Section 46(c) applies to "cases and controversies" while § 2244(b)(3)(B) applies to the specific proceeding at issue here. To the extent they differ, the specific controls the general. The general statute says "heard and determined," while the specific statute says only "determined." Congress did not expect that there would be oral argument on these motions. "Determined" in these statutes means "decided." See *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, 688 (1960).

Section 46(c) provides for three-judge panels as a general rule. The language, supported by legislative history, fortifies the three-judge panel as the norm. See *Western Pacific*, 345 U. S., at 258. The "grant of power" lies in the "unless" clause. See *ibid.* In contrast, § 2244(b)(3)(B) contains substantially the same three-judge panel language but omits the "unless" clause. Instead of "determined . . . unless" it says "determined" period. "Nothing, indeed, but a different intent explains the different treatment." *Lindh* v. *Murphy*, 521 U. S. 320, 329 (1997). Nothing, indeed, but a different intent explains the existence of paragraph (B) at all. If Congress intended that determination by three-judge panels should be the norm, but that determination or redetermination en banc would be discretionary with the court, there would have been no reason to mention the subject at all. The general rule of § 46(c) already provides that. "*En banc* courts are the exception, not the rule." *American-Foreign*, 363 U. S., at 689. Absent a compelling justification, statutes

should not be construed to render language superfluous. See *Stone* v. *INS*, 514 U. S. 386, 397-398 (1995). There is no justification, compelling or otherwise, in this case. On the contrary, prohibition of rehearing en banc is fully consistent with the purpose of the statute and with the prohibition of certiorari.

B. Successive Petitions and AEDPA.

Of all the problems in capital habeas litigation prior to AEDPA, none cried out for reform more loudly than the abuse of the writ by repeated petitions, making new claims in each round. This is the area where Congress was most emphatic in its determination to curtail abusive practices. The exemplar of abuse was the Ninth Circuit's notorious mishandling of the case of Robert Alton Harris.

In *McCleskey* v. *Zant*, 499 U. S. 467 (1991), this Court tightened the restrictions on successive petitions by adopting the cause-and-prejudice/actual innocence standard from the procedural default cases, replacing the "deliberate abandonment" standard. See *id.*, at 490, 493-494. It was widely believed that this tightening of the standard would curtail the abuse of successive petitions and allow most cases to proceed to execution reasonably soon after the decision on appeal of the first federal habeas petition. Indeed, *amicus* CJLF proposed this standard to the *McCleskey* Court, see *id.*, at 523, n. 10 (Marshall, J., dissenting), in the belief that it would strike the appropriate balance. Regrettably, the *Harris* case would soon demonstrate that stronger medicine was needed.

Eleven years after his conviction and sentence for a double murder, Robert Alton Harris filed his *third* federal habeas petition. See *Harris* v. *Vasquez*, 949 F. 2d 1497, 1500 (CA9 1991). Four months after *McCleskey* a panel of the Ninth Circuit affirmed denial of habeas relief, based on *McCleskey* as well as other grounds. See *id.*, at 1501. Yet justice in this case, already long overdue, was further delayed by a blizzard of successive petitions, petitions for rehearing, stay of mandate,

certiorari, and recall of mandate, in addition to a civil rights lawsuit, all on top of state proceedings. See Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 321-326 (1992). The Ninth Circuit and its judges issued three stays, see *id.*, at 324, which were vacated by this Court in *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-766) and *Gomez* v. *United States District Court*, 503 U. S. 653 (1992) (*per curiam*). An individual circuit judge issued yet another stay after Harris was already in the gas chamber, resulting in this Court's extraordinary order that the lower federal courts would issue no further stays. See *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-768).

The outrage from this debacle reverberated across the nation. As the various habeas reform bills moved through Congress, supporters of reform repeatedly cited *Harris* as the prime example of what was wrong with the system. See 141 Cong. Rec. 4107-4108 (1995) (statement of Mr. Cunningham); *id.*, at 4111-4113 (statement of Mr. Cox); *id.*, at 9304, col. 2-3 (statement of Sen. Specter); *id.*, at 14734, col. 1 (statement of Sen. Feinstein); *id.*, at 15019, col. 2 (statement of Sen. Specter); 142 Cong. Rec. 4610, col. 1 (1996) (statement of Mr. Hyde); *id.*, at 7562, col. 3 (statement of Sen. Feinstein); *id.*, at 7798, col. 2-3 (statement of Sen. Specter); *id.*, at 9462, col. 2 (statement of Sen. Abraham).

Although other parts of the habeas reform were highly controversial, there was broad, bipartisan consensus that strong measures were needed on successive petitions. Senator Biden, the principal opponent of the "deference" standard of 28 U. S. C. § 2254(d), agreed that "strict" limits on successive petitions were in order. See 141 Cong. Rec. 15047, col. 3 (1995).

To prevent extended proceedings after the first round in most cases, while still providing a safety value for exceptional cases, Congress devised a two-step plan. Substantively, Congress tightened the criteria for successive petitions, making them far more stringent than the *McCleskey* standard. See 28

U. S. C. § 2244(b)(1), (2). Procedurally, Congress established a " 'gatekeeping' mechanism" in subdivision (b)(3). See *Felker* v. *Turpin*, 518 U. S. 651, 657 (1996).

Congress designed the gatekeeping mechanism to avoid the multiple rounds of reconsideration that made the *McCleskey* rule inadequate. Instead of the usual decision by the District Court and review by the Court of Appeals, this unique statute has the three-judge appellate panel determine the existence of a prima facie case as the first step. See § 2244(b)(3)(A)-(C). In nearly all cases, this is intended to be the *only* decision on whether the petitioner may file his successive petition.[6]

Subdivision (3)(E) precludes petitions for rehearing or certiorari. " '[I]t would be a strange rule . . . which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition . . . .' " *Carlisle* v. *United States*, 517 U. S. 416, 422 (1996) (quoting *United States* v. *Smith*, 331 U. S. 469, 474 (1947)). Normally, a statute or rule limiting when a motion for an action can be made also limits the authority of the court to take that action. That is how this Court understood this provision in *Felker*. "Section 2244(b)(3)(E) *prevents* this Court from reviewing a court of appeals order denying leave to file a second habeas petition by appeal or writ of certiorari." 518 U. S., at 658-659 (emphasis added).

Rehearing en banc is arguably distinguishable from certiorari and panel rehearing in that, in 1996, litigants could not "petition" for it but only "suggest" it. See *Missouri* v.

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6. The Court of Appeals' decision that the petitioner has made a prima facie case that he can meet the criteria does not establish that he has actually met them. That issue is determined by the District Court and subject to review in the usual course of proceedings. See § 2244(b)(4).

Jenkins, 495 U. S. 33, 46, n. 14 (1990).[7] However, the elimination of en banc review does not rest on paragraph (3)(E) alone, but primarily on paragraph (3)(B). See Part III-A, *supra*, at 13-16.

Understood in this way, the congressional design is clear and consistent. The gatekeeping mechanism decides whether there will or will not be another round of federal habeas litigation. To preclude that decision from routinely spawning its own multi-round litigation, it is assigned directly to a three-judge panel, and all the routine mechanisms of review are prohibited. Only the extraordinary measures of mandamus, prohibition, and original habeas in this Court remain.

In the *Harris* case, the three-judge panel had decided against Harris both on his fourth federal habeas petition, *Harris* v. *Vasquez*, 961 F. 3d 1450 (CA9 1992), and on his attempt to evade *McCleskey* through a civil rights action. See *Gomez* v. *United States District Court*, 1992 U. S. App. LEXIS 7931 (CA9, Apr. 20, 1992), withdrawn and dismissed as moot, 966 F. 2d 463 (CA9 1992). The stays vacated by this Court in *Gomez* were for the purpose of allowing reconsideration of these decisions en banc. To construe subdivision (b)(3) as allowing reconsideration en banc while forbidding all the other normal modes of review, one would have to attribute to Congress an intent to leave intact the very form of review so badly abused in the case overwhelmingly cited as the exemplar of abuse.

Both the clear text of the statute and the unambiguous intent to prevent cases like *Harris* are contrary to such an interpretation. The statute requires the motion to be *determined* by the three-judge panel, period. The general authority to rehear en banc is withdrawn from this particular proceeding.

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7. This distinction was eliminated in the 1998 amendments. See Committee Notes on 1998 Amendments to Fed. Rule App. Proc. 35(b), 28 U. S. C. App., p. 626.

CONCLUSION

The petition for writ of certiorari should be granted, or, in the alternative, the Court should set the case for argument on whether an extraordinary writ should issue.

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Respectfully submitted,

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